SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

H. A. LOTT, LEE BLOCKER AND LORN D. FRAZIER,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners, H. A. Lott, Lee Blocker and Lorn D. Frazier, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case (No. 17,888 below) on September 25, 1962.

History of the Case

This is the second time that this case has been before this Court. The Court of Appeals originally dismissed the appeal on the ground of lack of jurisdiction. 280 F. 2d 24 (5 Cir. 1960). After granting certiorari, this Court determined that jurisdiction was present and remanded the case to the Court of Appeals for decision on the merits (No. 238, October Term, 1960). The opinion of this Court is reported at 367 U.S. 421. On remand from this Court, the Court of Appeals affirmed Petitioners' convictions.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals, on remand, printed in Appendix B hereto, *infra*, p. 7a, is reported at ..... F. 2d ....

JURISDICTION

The judgment of the Court of Appeals, on remand, was dated and entered September 25, 1962 (T.R. 31;[1] *infra*, p. 29a). No petition for rehearing was filed with the Court of Appeals. Jurisdiction of this Court is invoked under 62 Stat. 928, 28 U.S.C. §1254(1), and Supreme Court Rule 22(2).

QUESTIONS PRESENTED

The questions forming the basis for this petition for certiorari, are as follows:

1. Whether the action of the District Court in deferring sentencing, and basing the convictions and sentences upon evidence adduced at the trial of others charged in the indictment, violated Petitioners' rights under the Sixth Amendment and constituted a rejection of the pleas of *nolo contendere* which resulted in loss of jurisdiction to convict and sentence Petitioners upon such pleas.

2. Whether the three-month delay in sentencing Petitioners, during which time the sentencing judge presided at the trial of others charged in the indictment, was unreasonable under the circumstances of the case and resulted in Petitioners being deprived of due process of law.

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[1] The certified copy of the record filed herewith is in two parts. The first part includes all the proceedings before the previous grant of certiorari by this Court; references designated "R" are to the first part. The second part includes the proceedings in the Court of Appeals upon remand by this Court; references designated "T.R." are to the second part of the record.

3. Whether an indictment purporting to charge *individual* officer-employees with attempting to evade *corporate* income taxes, and conspiracy to do so, is sufficient wherein:

(a) The indictment does not charge what part the accused officer-employees *individually* had in the alleged attempt to evade corporate income taxes.

(b) The indictment does not charge that there was a deficiency in the payment of income taxes by the corporation, or that the accused had knowledge of any deficiency.

(c) The conspiracy count of the indictment purports to charge a single conspiracy to attempt to evade taxes for *four* separate years.

(d) The conspiracy count of the indictment does not charge all the basic elements of the substantive offense of attempted evasion of corporate income taxes.

4. Whether imposition of prison sentences for felony offenses (in excess of one year) was beyond the jurisdiction of the District Court wherein the written judgments adjudged that Petitioners were convicted of the misdemeanor offenses of "filing false and fraudulent corporate income tax returns" and "conspiring to file false and fraudulent corporate income tax returns."

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

This case involves U.S. Const. amends. V, VI; Int. Rev. Code of 1939, ch. 1 §§145(a), 145(b), 53 Stat. 62, as amended, 57 Stat. 144; Int. Rev. Code of 1954, ch. 75, §§7201, 7203, 7207, 68A Stat. 851, 853; Conspiracy Act, 62 Stat. 701, 18 U.S.C. §371; Fed. R. Crim. P. 7(c), 11,

31(c), 32, 35, 36. The foregoing constitutional provisions, statutes and rules are printed in Appendix A, *infra*, p. 1a.

STATEMENT OF THE CASE

The three Petitioners were convicted, fined and sentenced to imprisonment by the United States District Court for the Southern District of Texas, Houston Division, on the basis of a Federal grand jury indictment (R. 11-23), printed in Appendix C hereto, *infra*, p. 36a, which purports to charge them, along with Richard A. Farnsworth, Sr., and Alan Farnsworth, in five counts. Counts 1 through 4 purport to charge a willful attempt to evade and defeat taxes of Farnsworth & Chambers Company, Inc. (a Texas corporation) for the years 1951 through 1954, in violation of Section 145(b) of the Internal Revenue Code of 1939 (counts 1-3), and Section 7201 of the Internal Revenue Code of 1954 (count 4). Count 5 purports to charge a conspiracy to willfully attempt to evade and defeat taxes of Farnsworth & Chambers Company, Inc., for the same years, in violation of 18 U.S.C. §371. Petitioners were employee-officers and minor stockholders (approximately 7% among them) of the corporation (R. 111, 533).

Following return of the indictment on April 14, 1958, Petitioners were arraigned and pleaded "not guilty" (R. 24). They filed motions to dismiss the indictment (R. 62), for severance (R. 47), and for a bill of particulars (R. 24, 82), but these were denied (R. 347). Petitioners then asked to be rearraigned for the purpose of entering pleas of *nolo contendere* (R. 444, 466). Acceptance of the pleas was opposed by the Government (R. 444-446, 466), but they were accepted by the District Court on March 17 and 20, 1959 (R. 464, 483).

After accepting such pleas, the District Court deferred sentencing and presided at the trial of Richard A. Farns-

worth, Sr., and Alan Farnsworth under the indictment. This jury trial commenced early in April, 1959, and lasted through eleven weeks. Alan Farnsworth was found not guilty on all counts, but the jury failed to reach a verdict as to Richard A. Farnsworth, Sr. Although almost three and one-half years have elapsed since the mistrial, Richard A. Farnsworth, Sr. has not been retried.

Following the frustrating efforts of the Government in the Farnsworth trial (which ended June 9, 1959), Petitioners were called before the District Court on June 19, 1959, for sentencing (R. 487). During the sentencing proceedings repeated reference was made to evidence adduced at the Farnsworth trial (R. 488, 525, 532, 550). Petitioners were orally sentenced to serve terms of imprisonment, three years in the case of Blocker and two years each in the cases of Lott and Frazier, and each of the three was fined $20,000 (R. 551-552). The written judgments were filed on June 22, 1959; they adjudge Petitioners guilty of "filing false and fraudulent corporate income tax returns" and "conspiring to file false and fraudulent corporate income tax returns," although they refer to the statutes set out in the indictment (R. 553-559; *infra*, pp. 30a-35a).

Entry of the judgments was followed by the timely filing of motions in arrest of judgment by all Petitioners (R. 559-566), which were denied (R. 568-569), and notices of appeal to the Court of Appeals (R. 572, 613). The appeals were originally dismissed by the Court of Appeals for want of jurisdiction (R. 710), 280 F. 2d 24 (5 Cir. 1960), but this Court granted certiorari, reversed and remanded the case to the Court of Appeals, 367 U.S. 421 (1961). Although the questions presented in this petition were briefed and argued before this Court on the previous grant of certiorari, this Court confined its review to the jurisdictional question and remanded the case to the Court of Appeals for decision of

the issues raised by the appeal. 367 U.S. 421 (1961). Upon remand, the Court of Appeals (after re-argument and nearly ten months of deliberation on the case) affirmed the judgments of conviction and sentences (T.R. 31; *infra*, p. 29a).

REASONS FOR GRANTING THE WRIT

There are several compelling reasons why a review on writ of certiorari should be granted in this case:

1. This case involves extremely important questions of federal criminal procedure which should be determined by this Court.

2. The handling of this case represented a sharp departure from the customary and accepted practice in criminal cases.

3. The function and place of the plea of *nolo contendere*, authorized by Rule 11,[2] is clouded by doubt and confusion which should be clarified by this Court. In this case, after entering the plea, the Petitioners were in effect tried *in absentia* and convicted and sentenced on the basis of evidence adduced at a trial to which they were not parties.

4. What constitutes an "unreasonable" delay in sentencing, within the meaning of Rule 32(a), should be clarified by this Court. In this case a studied and deliberate delay of three months, which was highly prejudicial to Petitioners, was sanctioned by the Court of Appeals.

5. The Court of Appeals sanctioned use of a form of indictment which, although in common usage in personal tax evasion cases, utterly fails to inform the

[2] All references to Rules are to the Federal Rules of Criminal Procedure, unless otherwise stated.

accused of the nature and cause of the accusation against him when applied to a corporate tax evasion case involving employees of a large corporation and *does not adequately charge the essential elements* of the offense of attempted income tax evasion.

6. The decision of the Court of Appeals, insofar as it upholds the conspiracy count of the indictment, is in direct and irreconcilable conflict with a very recent decision of the United States District Court for the Eastern District of Pennsylvania. *United States* v. *Goldberg*, 206 F. Supp. 394, 397 (1962).

7. The effect of a variance between the oral pronouncement and the written judgment in a criminal case is a very live issue which should be resolved by this Court. In this case Petitioners were sentenced for felonies although the written judgments seemed to convict them of misdemeanors.

8. The decision of the Court of Appeals was wrong.

Trial in Absentia

The handling of this case represented a sharp departure from customary and accepted practice in criminal cases. Petitioners were in effect tried *in absentia*. Contrary to the Sixth Amendment they were sentenced, after an unreasonable delay, on the basis of evidence adduced at another trial — as is made plain by the statements of the judge on the day of sentencing. Indeed, when this case was last before this Court, in the Government's brief, pp. 34-35, the Solicitor General admitted that "If they [Petitioners] were sentenced on evidence adduced at the trial of their co-defendants, they may have been deprived of their rights under the Sixth Amendment . . . ."

The unusual action of the trial court, which was sanctioned by the Court of Appeals, creates considerable doubt

concerning the application and effect of the plea of *nolo contendere* authorized by Rule 11 — which doubt should be resolved by this Court. Existence of the doubt, and the importance of the question, is shown by the statement of policy of the United States District Court for the Southern District of Texas — apparently as a result of this case — that pleas of *nolo contendere* by individuals in felony cases will no longer be accepted, as reported in The Houston Post, May 22, 1960, Sec. 1, p. 16, reproduced in Appendix D., *infra*, p. 47a. Unless review is granted, such defendants in the Southern District of Texas will not have the opportunity to enter such a plea. That seems to be an unwarranted restriction of judicial discretion which was not contemplated by Rule 11.

Nolo contendere is not a waiver or consent to be tried by the court; neither does it constitute a conviction or a determination of guilt. This much at least was established by this Court when this case was last here. *Lott* v. *United States*, 367 U.S. 421 (1961). As this Court held earlier in *United States* v. *Norris*, 281 U.S. 619 (1930), when a plea of *nolo contendere* has been received, nothing remains for the court to do but to render judgment and sentence on the plea as no issue of fact can exist and none can be made to exist while the plea remains of record. Thus the plea of *nolo contendere* precludes a trial of the issue of guilt or innocence. Such a plea permits the court, without more, to sentence the accused, but only on the basis of the plea.

In this case the trial court accepted Petitioners' pleas of *nolo contendere*, but then deferred sentencing and proceeded to try the Farnsworths, who had been indicted jointly with Petitioners. Petitioners were in practical effect on trial during the Farnsworth trial, although they were neither present nor represented, were not parties

to the trial and were not confronted with the witnesses against them. Evidence against Petitioners was received without benefit of cross-examination or rebuttal evidence on their behalf. They were tried *in absentia*.

The single most significant fact is the inescapable conclusion that the issue of guilt or innocence of these Petitioners was tried by the trial court. This is dramatically shown by the opening note struck on the day of sentencing. The trial court asked if the Government had anything to say. The Government's counsel stated (R. 488):

> "Your Honor, I believe the Court has heard the *facts tried* following these gentlemen's pleas."

While the statement of the Government's counsel is not binding upon the trial court, there is not the slightest doubt that this was the trial court's opinion also since it said virtually the same thing later in the sentencing proceedings. The last character witness for Mr. Lott, Reverend Westmoreland, testified (R. 550):

> "I would like to say that every member of our congregation would come here as a witness in his behalf, and they would say that he is one of the cleanest Christian men we have ever known."

Whereupon, the trial court turned to Reverend Westmoreland and said (R. 550):

> "But none of them were present during the ten weeks of testimony, were they?"

It clearly appears from the statements made in court on the day of sentencing that Government counsel and the trial judge had the Farnsworth trial and the evidence adduced therein uppermost in their minds. Shortly thereafter the trial court orally sentenced from the bench as follows (R. 551):

> "I have found each [defendant] guilty of the felonies as contained in the Grand Jury indictment."

To those present in the courtroom that day, the oral sentence by the trial court was obviously based upon what had been heard in the Farnsworth trial. Indeed, it was apparent to all that the trial court itself had found as a fact that Petitioners were guilty as charged in the indictment — from the *evidence,* not on the basis of their pleas of *nolo contendere.* In practical effect Petitioners were tried by the trial court. The written judgments state that "It is adjudged that the defendant is guilty as charged and convicted" (*e.g.,* R. 554; *infra,* p. 30a).

That Petitioners were prejudiced seems obvious in the light of the sentences imposed. After the lengthy trial of the co-defendants, the jury found one vice president innocent and the guilt or innocence of the chairman of the board could not be agreed upon. A question is raised in these circumstances as to why the trial court did not impose merely a fine or at most a suspended sentence on these Petitioners, unless it is true that the trial court had decided — on evidence adduced at the Farnsworth trial — that these Petitioners were guilty as charged in the indictment. Everything points to the fact that Petitioners were convicted and sentenced on evidence adduced at a trial they did not attend. The error is great and its results plain.

Such proceedings certainly violated Petitioners' rights under the Sixth Amendment. Furthermore, it appears that the action of the trial court constituted an implied rejection of the pleas of *nolo contendere* and that it thereby lost jurisdiction to convict and sentence Petitioners upon such pleas. *Tucker* v. *United States,* 196 Fed. 260, 268 (7 Cir. 1912).[3]

[3] The holding of the *Tucker* case that sentence of imprisonment cannot be had under a plea of *nolo contendere* was overruled in *Hudson* v. *United States,* 272 U.S. 451 (1926); however, its holding that rejection of the plea may be inferred from the fact that evidence was received by the trial court remains intact.

Unreasonable Delay in Sentencing and Lack of Procedural Due Process in Sentencing Procedure

This case presents important questions of interpretation of the Federal Rules of Criminal Procedure, as well as grave Constitutional issues, which should be determined by this Court. Rule 32(a) requires that "Sentence shall be imposed without unreasonable delay." However, in this case the trial court, after accepting pleas of *nolo contendere*, waited three months to sentence Petitioners, during which time it heard the Farnsworth trial. As demonstrated above, this delay was highly prejudicial to Petitioners. It was unreasonable and must be considered as "purposeful [and] oppressive" under the circumstances. *Pollard v. United States*, 352 U.S. 354, 361 (1957).

Rule 32(c) provides for a pre-sentence investigation report to be prepared by experienced and objective probation officers to assist the court in rendering sentence. Petitioners do not contend that the court in a normal *nolo contendere* case cannot consider the pre-sentence investigation report prepared by the probation officer. Petitioners are aware of the normal practice of the court hearing counsel for both sides as to what the evidence would show if the case had gone to trial on the issue of guilt or innocence. But to the certain prejudice of these Petitioners, most of the normal and traditional procedures were ignored in this case. The trial court did request pre-sentence reports. Such reports are not in the record, but it is indisputable that they showed Petitioners to be men with previously perfect reputations for honesty and integrity — highly respected members of the community. Although the record does not reflect it, it is nevertheless true that the probation officer regularly attended the Farnsworth trial. It would be strange indeed if the probation officer's pre-sentence reports in this case were not fairly accurate summaries of

the evidence adduced against Petitioners during the Farnsworth trial.

In upholding this sentencing procedure, the decision of the Court of Appeals conflicts in principle with *Townsend* v. *Burke*, 334 U.S. 736 (1948). In *Townsend* this Court reversed a sentence entered by a state court against an accused on the ground that the sentencing proceedings themselves failed to meet the standard of fairness required by due process. In *Townsend* there were statements made by the trial court during the sentencing proceedings which indicated that it was misinformed as to certain offenses thought to have been committed by the defendant. The truth was that some of the offenses had not taken place. This Court held that the sentencing proceedings lacked due process because the sentence was based upon a foundation materially false which the prisoner (who was without benefit of counsel) had no opportunity to correct.

In this case statements were made by the trial court on the day of sentencing which clearly established the unlawful foundation upon which it imposed sentences; a foundation based upon evidence adduced at the Farnsworth trial. This evidence had not been tested in accordance with the traditional constitutional safeguards and therefore it constituted as unrealiable a foundation as that described in *Townsend*. Clearly the evidence adduced at the Farnsworth trial *did* influence the sentences. As stated in *Townsend* (344 U.S. at 740):

> "... We are not at liberty to assume that items given such emphasis by the sentencing court did not influence the sentence which the prisoner is now serving."

It is no answer for the Government to say that Petitioners did not object to the delay, or, having asked for

early sentencing, nevertheless entered pleas of *nolo contendere* when the trial court refused to sentence until the Farnsworth case was completed. When an accused pleads *nolo contendere* he throws himself upon the mercy of the court, and it ill behooves him to push the court or to complain about the delay in sentencing. These circumstances cannot be fairly construed to result in a waiver of due process of law in the sentencing procedure.

Insufficient Indictment

An extremely important question concerns the validity of the indictment (R. 11; Appendix C, *infra*, p. 36a) under which Petitioners were convicted. It appears that this Court has never directly passed upon the requisites of an indictment for criminal income tax evasion. The necessity that such requisites be definitely established, and the importance of the matter, is shown by the fact that criminal indictments (or informations) in tax cases of all types were returned against 7,556 defendants during the fiscal year ended June 30, 1961, of which 948 were income tax and miscellaneous cases. ANNUAL REPORT OF THE COMMISSIONER OF INTERNAL REVENUE FOR THE FISCAL YEAR ENDED JUNE 30, 1961, p. 41.

The instant indictment purports to charge Petitioners with attempted evasion of income taxes imposed upon a large *corporation* — not their *personal* income taxes. Under such circumstances, it certainly should state facts sufficient, as a practical matter, to apprise each Petitioner with reasonable detail of the criminal acts attributed to him, so that each would know the charge against him and could prepare his defenses thereto. The indictment utterly fails in these respects. It is in the abbre-

viated form customarily used in personal income tax cases. While the short-form indictment could possibly be justified in a personal income tax evasion case, it is grossly inadequate and unfair in a corporate income tax case involving employees of varying responsibilities. The instant indictment does not inform Petitioners of the nature and cause of the accusation against them within the meaning of the Sixth Amendment to the Constitution of the United States, and it should be repudiated by this Court.

The decision of the Court of Appeals, in upholding the indictment, conflicts in principle with *Russell* v. *United States*, 369 U.S. 749 (1962), in which an indictment was held to be insufficient under analogous circumstances. In *Russell* this Court held that an indictment which does not apprise the accused with reasonable certainty of the nature of the accusation against him is defective although it may follow the language of the statute; and that an indictment in the language of the statute is not sufficient unless the words of the statute *fully, directly and expressly, without any uncertainty or ambiguity,* set forth *all elements* of the offense. 369 U.S. at 765. Manifestly, the instant indictment does not meet the above tests. It fails to charge that there was a tax deficiency, which — as recognized by this Court in *Lawn* v. *United States*, 355 U.S. 339, 361 (1958), and many lower court decisions — is "[O]ne of the basic elements of the offense." *Small* v. *United States*, 255 F. 2d 604, 606 (1 Cir. 1958). Nowhere does the indictment state how much tax the corporation *paid* for or during the years in question; consequently it cannot be fairly construed to charge existence of a tax deficiency. By the same token, the indictment utterly fails to charge that the accused had knowledge of any tax deficiency, another essential element of the offense. *Ingram* v. *United States*, 360 U.S. 672 (1959).

With reference to the conspiracy count of the indictment, the decision of the Court of Appeals is in direct and irreconcilable conflict with *United States v. Goldberg*, 206 F. Supp. 394, 397 (E.D. Pa. 1962), in which it was held:

> "Conspiracy to commit such a substantive offense cannot exist without *at least* the degree of criminal intent necessary for the substantive offense itself. Ingram v. United States, 360 U.S. 672, 678, 79 S. Ct. 1314, 3 L. Ed. 2d 1503 (1959). It follows that persons can conspire to evade a tax only if they are fully aware of the existence of a tax obligation to the Government which they seek to conceal. Since income taxes become due and payable on an annual basis, it seems manifest that persons cannot at one and the same time conspire to evade more than one year's taxes."

The Court of Appeals stated that "We cannot accept the reasoning in the *Goldberg* case . . ." (T.R. 15; *infra*, p. 16a.)[4] It appears that no appeal will be taken by the Government in *Goldberg* since several other counts of the indictment were sustained.

The conspiracy count of the instant indictment is also fatally defective in that it wholly fails to charge, or even mention, essential elements of the substantive offenses which were alleged to be the object of the conspiracy, namely (1) existence of a tax deficiency, and (2) knowledge of a tax deficiency.

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[4] On this point the Court of Appeals relied upon *United States* v. *Johnson*, 123 F. 2d 111, 123 (7 Cir. 1941), *rev'd on other grounds* 319 U.S. 503 (1943). Since it appears that the indictment in the *Johnson* case charged a conspiracy to defraud the United States, rather than a conspiracy to commit offenses against the United States, it is readily distinguishable. Furthermore, the Court of Appeals in *Johnson* does not appear to have considered the precise argument adopted in *Goldberg*.

Misdemeanor Judgments

The judgments in this case present an important and live issue which should be determined by this Court. At the present time there are no clear guidelines to determine the effect of variances between the oral pronouncement and the written judgment in a criminal case. In the instant case Petitioners have been sentenced to terms of imprisonment for felonies. However, the written judgments adjudge them guilty of "filing false and fraudulent corporate income tax returns" and "conspiring to file false and fraudulent corporate income tax returns" (R. 553-559; *infra*, pp. 30a-35a). The language first quoted describes the misdemeanor offenses proscribed by Sections 7203 and 7207, Int. Rev. Code of 1954, and Section 145(a), Int. Rev. Code of 1939. These misdemeanor offenses are lesser offenses included within the felony charges. Under 18 U.S.C. §371, conspiracy to commit a misdemeanor subjects the offender to no more than the maximum punishment provided for the misdemeanor. Pursuant to Rule 31(c) it was within the authority of the trial court to so convict Petitioners of the lesser included offenses.

It is Petitioners' contention that, as a matter of law, they stand convicted of misdemeanors — not felonies; that the written judgments are controlling. Similar issues were considered by this Court during the October Term, 1960 (Nos. 180, 184). In those cases the *Government* argued that the written judgments were controlling. However, both cases were affirmed by an *equally divided Court*, so the issue was not determined. *Payne* v. *Mandigan*, 274 F. 2d 702 (9 Cir. 1960), *aff'd* 366 U.S. 761 (1961); *Young* v. *United States*, 274 F. 2d 698 (8 Cir. 1960) *aff'd* 366 U.S. 761 (1961). Petitioners submit that the formal written adjudications of guilt cannot be dismissed as "clerical errors," under Rule 36, as was done by the Court of Appeals. Permitting the

district court to now substitute new written findings of guilt of felonies for the findings now in the judgments, under the guise of correcting clerical errors, goes far beyond the scope of existing authorities permitting correction of clerical errors. If the judgments do not constitute misdemeanor convictions they are patently wrong on their faces and must be set aside as wholly invalid.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated October 23, 1962.

APPENDIX A

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Constitution of the United States

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Internal Revenue Code of 1939

Sec. 145. Penalties

(a) Failure to file returns, submit information, or pay tax. Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declara-

tion, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution. (53 Stat. 62, as amended, 57 Stat. 144.)

(b) Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution. (53 Stat. 62.)

• • •

Internal Revenue Code of 1954

Sec. 7201. Attempt to Evade or Defeat Tax.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution. (68A Stat. 851.)

Sec. 7203. Willful Failure to File Return, Supply Information, or Pay Tax.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution. (68A Stat. 851.)

Sec. 7207. Fraudulent Returns, Statements, or Other Documents.

Any person who wilfully delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both. (68A Stat. 853.)

United States Code

Title 18

Sec. 371. Conspiracy to Commit Offense or to Defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to

effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. (62 Stat. 701.)

Federal Rules of Criminal Procedure

Rule 7. The Indictment and the Information.

* * *

(c) Nature and Contents. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

* * *

Rule 11. Pleas.

A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse

to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

* * *

Rule 31. Verdict.

* * *

(c) Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

* * *

Rule 32. Sentence and Judgment.

(a) Sentence. Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.

(b) Judgment. A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

(c) Presentence Investigation.

(1) When Made. The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise.

directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

(2) **Report.** The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the Court.

(d) **Withdrawal of Plea of Guilty.** A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

(e) **Probation.** After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation as provided by law.

Rule 35. Correction or Reduction of Sentence.

The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari.

Rule 36. Clerical Mistakes.

Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

Appendix B

OPINIONS AND JUDGMENTS BELOW

Court of Appeals Opinion on Remand

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 17888

H. A. LOTT, LEE BLOCKER AND LORN D. FRAZIER,

Appellants,

VERSUS

UNITED STATES OF AMERICA,

Appellee.

Appeals from the United States District Court for the Southern District of Texas.

(SEPTEMBER 25, 1962)

Before TUTTLE, Chief Judge, POPE* and GEWIN, Circuit Judges.

GEWIN, Circuit Judge: The three appellants and two others were charged in a five count indictment with attempting to evade and defeat income taxes of a named corporation. The first four counts are substantive and relate to the years 1951, 1952, 1953 and 1954 respectively. The fifth count charged a conspiracy to evade and defeat

* of the Ninth Circuit, sitting by designation.

the same corporation's income tax for the years 1951 to 1954 inclusive. After entering pleas of not guilty, and after careful and cautious consideration by the court, each of the appellants was permitted to withdraw his plea of not guilty and enter a plea of nolo contendere. Following the pronouncement of sentence and the entry of formal written judgments, motions in arrest of judgment were filed by each appellant. The motions were denied and thereupon the appellants appealed.

Sentencing of the appellants was deferred after they were allowed to enter pleas of nolo contendere. The Government strongly objected to the nolo contendere pleas. During the period of deferment, the trial judge who had accepted the nolo contendere pleas presided over a lengthy trial of the defendants Farnsworth, the two others who had been jointly indicted with the appellants. One of the two was acquitted and the jury was unable to agree on a verdict as to the other. Thereafter, on June 19, 1959, the same trial judge sentenced the appellants. The appellant Blocker was sentenced to 3 years to be served; and appellants Frazier and Lott were each sentenced to 2 years to be served, under each count, the sentences to run concurrently. Each appellant was fined the total sum of $20,000.00. The appellants owned a total of 7% of the stock of the company. Blocker was Treasurer and both Frazier and Lott were Vice Presidents.

Although their contentions are separately presented, the alleged errors relied on by Blocker and those relied on by Lott and Frazier are essentially the same and may be summarized as follows:

1. The indictment is insufficient.

2. Delay in sentencing resulted in a denial of due process.

3. The court was without jurisdiction to impose sentences on the pleas of nolo contendere after hearing the evidence presented at the trial of the other two jointly indicted defendants.

4. Defects in the formal written judgment of the court.

We will deal with each of these contentions separately. As part of the history of this case, reference is made to *Lott, et als.* v. *U. S.*, 5 Cir., 1960, 280 F. 2d 24, 367 U. S. 421; 6 L. Ed. 2d 940, 81 S. Ct. 1563 (1961).

I.

The Indictment

It is contended that the indictment does not apprise the appellants of "the nature and cause of the accusation" within the meaning of the Sixth Amendment to the United States Constitution and does not charge all the basic elements of the offense of attempting to evade and defeat corporate income taxes. The first 4 counts are substantive and are essentially the same except as to the amounts therein mentioned and the years involved. Each of these counts relates to a separate year. The fifth count charges conspiracy and relates to all of the years involved. While it is admitted that the indictment is framed in the words of the statute, it is contended that the statute is so vague that the appellants cannot determine the nature of the charge against them with sufficient certainty to enable them to make a defense or to avoid further prosecution for the same offense.

It is true that offenses must be accurately described in an indictment; and if necessary to do so, the allegations must be expanded beyond the words of the statute in order to embrace all the ingredients necessary to the offense. *U. S.* v. *Cruikshank*, 92 U. S. 542, 23 L. Ed. 588 (1876);

Babb v. *U. S.*, 5 Cir., 1955, 218 F. 2d 538; *U. S.* v. *Debrow*, 5 Cir., 1953, 203 F. 2d 699.

As examples of the contention made, the appellants cite *U. S.* v. *Strauss*, 5 Cir., 1960, 285 F. 2d 953, holding that in a prosecution against a corporate officer for alleged fraudulent transfer of corporate property in contemplation of bankruptcy, the indictment was defective because it did not set forth ". . . a plain, concise and definite statement of the offense . . .", failed to identify the property, and from aught appearing the transfer was made in the usual and regular conduct of the business; and *Clay* v. *U. S.*, 5 Cir., 1955, 218 F. 2d 483, in which it was held that an allegation of liability for tax coupled with a failure to pay was insufficient to constitute a felony violation, because there must be some affirmative act on the part of the defendant showing an attempt to evade the tax. The court observed that all that was alleged was that the defendants were engaged in the business of accepting wagers without having paid the occupational tax, which was only a conclusion unsupported by allegations of facts showing a willful attempt to evade, and therefore the indictment was insufficient.

The *Clay* case, supra, was discussed by this court in the later case of *Reynolds* v. *U. S.*, 5 Cir., 1955, 225 F. 2d 123:

> "That indictment (Clay) alleged the quo modo, it charged the attempt to evade the occupational tax 'by engaging in the business of accepting wagers . . . without having paid said occupational tax . . .' On the other hand the indictment in the present case pleads the offense substantially in the language of the statute, which is an approved mode of pleading with the single exception of an instance where the words of the statute do not contain all the essential elements of the offense. That exception can have no application here unless it be held that Spies v. United States, 317 U. S. 492

> [infra] added a substantive element to those contained in the statute defining a similar offense; and that is not true for the Spies case simply construed the statutory language, 'wilfully attempts in any manner to evade and defeat any tax . . .'. Indeed, in income tax cases, it has been stated that an indictment need not specify the means whereby the defendant attempted to evade and defeat the tax. Information as to the particular means employed may be obtained by a bill of particulars."

Also *U. S.* v. *Simmons*, 96 U. S. 360, 24 L. Ed. 819 (1878) in effect held that it was not necessary to state in the indictment the particular means by which the United States was defrauded of the tax. The defendant is entitled to a formal statement of the grounds upon which he is charged, but the Government is not held to such strictness of averments as might defeat the ends of justice. As there observed:

> "Such intent may, however, be manifested by so many acts upon the part of the accused, covering such a long period of time, as to render it difficult, if not wholly impracticable, to aver, with any degree of certainty, all the essential facts from which it may be fairly inferred."

A similar question arose in *Capone* v. *U. S.*, 7 Cir., 1932, 56 F. 2d 927, and the court concluded:

> "But it is contended by appellant that the indictment should have specified the means by which he attempted to evade or defeat the payment of the tax. Neither the Cruikshank Case nor any other case which we have been able to find supports this contention. In the Cruikshank Case it was stated that all rights are not guaranteed by the Federal Constitution, and that therefore, as a matter of law, a charge of conspiracy to defeat a citizen's constitutional right must show that the right threatened is one conferred by the Constitution. In other words, if a certain right is excepted in the defi-

nition of the crime, facts must be pleaded to avoid the exception.

"But in the instant case there are no exceptions, for the statute says that every attempt to evade or defeat the payment of income tax is a violation of law. What was a question of law in the Cruikshank Case, by reason of existing exceptions, is in the instant case a question of fact for the jury because of the absence of exceptions."

The indictment in the instant case goes further than merely charging the offense in the words of the statute. It expressly alleges various means by which the appellants attempted to evade the taxes such as falsifying invoices, concealing assets and diverting income. We cannot agree with the appellants that the means alleged are not adequate because of a failure to state in specific detail how these actions could result in underpayment of taxes of the corporation. *Spies* v. *U. S.*, 317 U. S. 492, 87 L. Ed. 418 (1943) discusses the statute involved and points out distinctions between subsection (a) and (b) of §145; subsection (a) being a misdemeanor and subsection (b) a felony:

"Wilfull but passive neglect of the statutory duty may constitute the lesser offense, but to combine it with a wilfull and positive attempt to evade the tax in any manner or to defeat it by any means lifts the offense to the degree of felony.

". . . By way of illustration and not by way of limitation, we would think affirmative wilfull attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal."

Appellants contend that the indictment is deficient in failing to show that there was an understatement of the tax or a tax deficiency, citing *Lawn* v. *U. S.*, 355 U. S. 339 and *Small* v. *U. S.*, 1 Cir., 1958, 255 F. 2d 604. Count one alleges that the net income of the corporation for the calendar year 1951 according to the tax return filed was the sum of $399,135.98 and that the amount of tax due thereon was the sum of $194,482.66; whereas, the defendants then and there well knew that the net income of the corporation for the calendar year 1951 was $763,699.62 upon which the corporation owed the United States a total tax of $482,278.96 in violation of §145(b) of the Internal Revenue Code of 1939. The other substantive counts contain essentially the same type of allegations for each of the years involved, but of course the figures are different for each year. A reading of the indictment indicates no absence of the elements complained about, and alleges the requisite knowledge and intent required. *U. S.* v. *Johnson*, 319 U. S. 503, 87 L. Ed. 1546; *Cave* v. *U. S.*, 8 Cir., 1947, 159 F. 2d 464.

Another defect is claimed to be that the indictment is defective in failing to charge that any of the appellants filed the return. *Benham* v. *U. S.*, 5 Cir., 1954, 215 F. 2d 472, concluded that proof of filing the return was necessary to the completion of the offense denounced under the facts of that case. There, the defendant was charged with attempting to defeat and evade the tax of his wife "*by filing or causing to be filed*" a false return on her behalf. Appellants take the point that the allegation of "mailing and causing to be mailed", does not satisfy this requirement. This question is dealt with in *Imholte* v. *U. S.*, 8 Cir., 1955, 226 F. 2d 585, in which the defendant was convicted of aiding and abetting an attempt by the President of the corporation of which the defendant was General Sales Man-

ager, to defeat and evade a large part of the income taxes owed by the corporation. It was held that the indictment was sufficient even though it failed to allege that the defendant had anything to do with filing the return, the substantive offense being the willful attempt to evade and defeat the payment of the tax. In *U. S.* v. *Albanese,* 2 Cir., 1955, 224 F. 2d 879, the indictment alleged in part as follows: ". . . preparing causing to be prepared and causing to be mailed in the Southern District of New York, thereby filing and causing to be filed with Commissioner of Internal Revenue in Albany a false and fraudulent return". It was there contended that since the returns were filed in Albany, the indictment should be dismissed, because the venue was in the Southern District of New York. The court held that the actual filing was not an essential allegation and stated:

> "The defendant's entire course of conduct in the Southern District of New York from preparing false records to the mailing of false returns, came within the ambit of the 'attempts' statute and venue was proper."

The crime denounced by 26 U.S.C.A. §145(b) is an attempt *in any manner* to defeat or evade any tax. We conclude that the allegations in the indictment here under consideration in the language ". . . mailing or causing to be mailed . . ." is sufficient. *United States* v. *Johnson,* 319 U. S. 503, 87 L. Ed. 1546 (1943). It is not necessary to prove that each defendant took hold of the envelopes containing the returns and helped place them in the post office when mailed.

Finally, appellants assert that the conspiracy count fails to charge the basic elements of the substantive offense. *U. S.* v. *Strauss,* 5 Cir., 1960, 283 F. 2d 155. It is contended that the indictment here constitutes a mere statement of a conclusion of the pleader that acts done in connection

with the conspiracy were in violation of the statute; and that the facts alleged fail to support the charge. *Wong Tai* v. *U. S.* 273 U. S. 77, 71 L. Ed 545 (1927) concludes that an indictment charging a conspiracy to commit a crime need not allege with technical precision all the elements essential to the commission of the offense, which is the object of the conspiracy, or to state such object with the details required of an indictment charging the substantive offense. To the same effect is *Braverman* v. *U. S.*, 317 U. S. 49, 87 L. Ed. 23 (1942), wherein it is succintly stated:

> "A conspiracy is not the commission of the crime which it contemplates and neither violates nor 'arises under' the statute whose violation is its object." (citing cases)

As pointed out in *Jelke* v. *U. S.*, 7 Cir., 1918, 255 Fed. 264, an indictment for conspiracy is sufficient if it follows the language of the statute and contains a sufficient statement of an overt act or overt acts, except where the object of the conspiracy is lawful but the means unlawful.

The appellants urge upon us the holding on the recent case of *U. S.* v. *Goldberg*, (D.C. E.D. Pa., 1962) F. Supp. . In that case, the district judge held that there cannot be a single conspiracy to evade and defeat income taxes pertaining to two separate taxable years, ". . . . because of the criminal intent necessary for the substantive offense of attempted tax evasion, we conclude that a single conspiracy embracing two separate taxable years is impossible.". The court then concludes as follows:

> "It follows that persons can conspire to evade a tax only if they are fully aware of the existence of a tax obligation to the Government which they seek to conceal. Since income taxes become due and payable on an annual basis, it seems manifest that persons cannot at one and the same time conspire to evade more than one year's taxes."

It is claimed that the *Goldberg* case presented a question of first impression.

We cannot accept the reasoning in the *Goldberg* case nor the fact that it presents a question of first impression. All cases are distinguishable on the facts, but the case of *U. S. v. Johnson, et al.*, 7 Cir. 1941, 123 F. 2d 111, 123 (reversed on other grounds 319 U. S. 503, 87 L. Ed. 1546 (1943)) had under consideration the same principles involved here. In *Johnson,* the fifth count of the indictment charged all of the defendants with a conspiracy extending from January 1, 1936 for the years 1936, 1937, 1938 and 1939 inclusive, to defraud the United States of income taxes due from Johnson. The court held the indictment good. It is interesting to note that the lower court held the first four counts defective as being inconsistent and duplicitous. They were considered inconsistent because the offense against Johnson was charged as of March 15th of each year; whereas, the co-defendants "as aiders and abettors" were charged with an offense which extended over a longer period. The counts were considered duplicitous by the Court of Appeals because it was alleged that the co-defendants aided and abetted Johnson both before and after March 15th of the relevant year. Accordingly, the court concluded that the co-defendants were charged in the same count as accessories before and after the fact. In reversing the Court of Appeals, (319 U. S. 503, 87 L. Ed. 1546) the Supreme Court held:

> "In short, the Circuit Court of Appeals read the substantive counts as though they charged Johnson merely with the filing of false returns on March 15th. That may only be a misdemeanor under §145(a) of the Internal Revenue Code, but that is not the offense with which Johnson was charged. He was charged with a felony made so by §145(b), the much more comprehensive violation of attempting 'in any manner to de-

feat and evade' the payment of an income tax. The false return filed on March 15th was only one aspect of what was a process of tax evasion. And all who contributed consciously to furthering that illicit enterprise aided and abetted its commission and thereby, under §332 of the Criminal Code, became principals in the common enterprise. Therefore, non-participation in merely one phase of Johnson's attempted evasion, namely, the filing of a false return on March 15th, is in itself irrelevant, and it is equally irrelevant, that the aid which the co-defendants gave Johnson continued after March 15th as well as preceded it. The crime of each of the first four counts is the wilfull attempt to evade the payment of what was due to the revenue. All who participated in that attempt were contributors to the illicit enterprise. There was only one offense in each count, and all who shared in its execution have equal responsibility before the law, whatever may have been the different roles of leadership and subordination among themselves. There is neither inconsistency nor duplicity in these four counts and the demurrers to them were properly overruled."

Although revenue laws were not involved in *Frankfort Distilleries, Inc.* v. *U. S.*, 10 Cir., 1944, 144 F. 2d 824, 832 (reversed on other grounds and conviction in district court sustained, 324 U. S. 293, 89 L. Ed. 951 (1945)), the principles of law relating to conspiracy are correctly stated in our judgment:

"The several acts and means of making the conspiracy effective are related acts which enter into the crime, but still the single crime is that of combining and conspiring together to restrain interstate trade and commerce, or to monopolize such trade and commerce. Duplicity in an indictment means the charging of two or more separate and distinct offenses in one count, not the charging of a single offense into which several related acts enter as ways and means of accomplishing the purpose. Braverman v. United States,

317 U. S. 49, 63 S. Ct. 99, 87 L. Ed. 23; United States v. New York Great Atlantic & Pacific Tea Co., supra."

We conclude that the conspiracy indictment in this case is not subject to the attack made upon it.

II.

Denial of Due Process

Appellants complain that the delay in sentencing was unreasonable in the circumstances of this case and resulted in depriving them of due process of law. Two of the appellants entered pleas of nolo contendere on March 17 and the other on March 20, 1959. Two other defendants jointly indicted with the appellants (Farnsworth) entered pleas of not guilty. Appellants were called for sentencing on June 19, 1959. The delay in sentencing was occasioned by the Farnsworth trial before the same judge. One of the Farnsworths was acquitted and there was a hung jury as to the other.

Appellants rely on *Townsend* v. *Burke*, 334 U. S. 736, 92 L. Ed. 1690 (1948), which reversed the sentence of a state court as being inconsistent with due process. In *Townsend*, the defendant was held virtually incommunicado for a period of 40 hours after his arrest, during which time he was constantly and vigorously interrogated. He did not have the advice of counsel and when the trial court imposed sentence, it relied upon a record of various crimes allegedly committed by the defendant, all of which had either been dismissed or the defendant had been found not guilty. The court was misled as to the facts. In *Pollard* v. *U. S.*, 352 U. S. 354, 1 L. Ed. 2d 393 (1957), the defendant was given probation in absentia and two years later was apprehended for violation of his probation. Sentence was then passed on his previous plea of guilty. It was there

pointed out that whether delay in completing the prosecution amounts to an unconstitutional deprivation of rights, depends on the circumstances in each case. The delay must not be oppressive or calculated to deny substantial rights to the defendant.

The present rule 32(a) F.R. Crim. P., which provides that sentence should be given without unreasonable delay, is a restatement of the previously existing procedure. See Rule 1 of Criminal Appeals Rules 1933, 292 U. S. 661, 78 L. Ed. 1513. *Berkowitz* v. *U. S.*, 8 Cir., 1937, 90 F. 2d 881, concluded that the above mentioned rule of the Supreme Court requiring sentence without delay, was not adopted for the benefit or protection of the accused and therefore he cannot complain that the sentence shall not begin until 30 days from the date of its pronouncement. 28 U.S.C.A., Rule 1 following §723(a). See also *Pratt* v. *U. S.*, *C.C.A.* D. C., 1939, 102 F. 2d 275 holding failure to impose sentence during term in which conviction was had does not defeat jurisdiction to sentence at a later term; *Miller* v. *Aderhold*, 288 U. S. 206, 210-12, holding that delay in imposing sentence, regardless of the length of delay, does not deprive the trial court of jurisdiction, where the defendant raises no objection; *Miner* v. *U. S.*, 3 Cir., 1917, 244 Fed. 422, concluding that the rule requiring prompt sentences does not change the law relative to jurisdiction, but was adopted to expedite criminal cases; *Bankey* v. *Sanford*, (D.C. N.D. Ga., 1947) 74 F. Supp. 756, deciding that after a plea of guilty, it is discretionary with the court as to when sentence should be imposed; *U. S.* v. *Provo*, 17 F.R.D. 183 (1955) and cases cited in footnote, holding that a right to a speedy trial may be waived and is waived unless demanded by the accused.

As stated in *Pollard*, the delay involved must be considered in the light of the circumstances surrounding the case. In the case at bar, it is stated in the final reply brief for

all of the appellants, although admittedly not shown by the record, that counsel for Appellant Lott, when considering a change of plea from not guilty to nolo contendere, requested the court to sentence Lott prior to the trial of the two defendants who pled not guilty. The brief further states, "It is also true that the trial judge refused to grant this request.". While we do not purport to decide this case on matters not of record; even if we did, it is apparent that Appellant Lott proceeded to tender his plea of nolo contendere notwithstanding the refusal of the trial judge to grant his request for early sentence.

We see no impropriety, indiscretion, inquiry or denial of any rights whatever by the delay of approximately 30 days between the time the pleas were entered and sentence pronounced. Before the pleas were entered, the court acted with great caution and all that transpired was in the presence of the appellants and their learned counsel. Notwithstanding this fact, the court was careful to inquire of the appellants individually as to whether each had separately decided to enter the plea voluntarily and made certain that the plea was not prompted by any promises which had been made. The court warned the parties of the seriousness of the charge and explained to each appellant that the charge wa willful tax evasion. They were warned not to expect leniency and that the sentence might be five years confinement in addition to a large fine. Over the objection of the Government, the court accepted the pleas, and directed a pre-sentence investigation "for sentence at conclusion of entire case". When the appellants were called for sentencing, no motion or request for permission to withdraw the pleas was made and the tenor of their statements was approval of their former decision to enter the plea and a confession of their improper conduct. Appellate courts must assume, in the absence of anything in the record to

the contrary, that delay in pronouncing sentence was for a lawful purpose in the orderly process of handling the case. Indeed, the record here does not require any inference or presumption, because the record clearly shows, without question, that the delay was proper, lawful and completely justified in the circumstances of this case.

III.

Loss of Jurisdiction Under Pleas of Nolo Contendere

Appellants have much to say about their pleas of nolo contendere and the meaning which it carries. The definition which they seem to prefer is that "nolo contendere is a mere statement of one's unwillingness to contest and no more". *Mickler* v. *Fahs*, 5 Cir., 1957, 243 F. 2d 515, 517; *Piassick* v. *United States*, 5 Cir., 1958, 253 F. 2d 658. It is admitted that there may be an adjudication of guilt in the sense that judgment of conviction may be entered on a plea of nolo contendere. For the purposes of this case, we have no trouble with the insistence of the appellants. Reasoning further, they complain that "conviction on a plea of nolo contendere" does not permit the court to receive or consider evidence in the case before the court, or any other related case, "from which it will independently determine the extent of the defendant's guilt or *culpability* as a basis for imposing sentence or punishment"; and that such a plea "operates to preclude judicial inquiry as to all matters of fact arising under the allegation contained in the indictment".[1] From the position thus taken, the appellants then conclude, or at least strongly intimate, that the court considered all of the evidence presented during the Farnsworth trial in deciding upon the sentence to be given these appellants. They indicate that the court should have

[1] Quotations from first reply brief of Appellant Loti. Although different language is used, essentially the same contention is made by all of the appellants.

made some limiting statement as to the evidence it had heard during the Farnsworth trial. In view of the fact that there was some mention of the Farnsworth trial at the time sentence was passed, it is concluded that the appellants were tried in absentia. Pressing further, it is contended that the plea of nolo contendere was thereby rejected and the court lost jurisdiction of the case to enter a judgment of conviction and to sentence the appellants.

We are unable to follow this reasoning process. The record is somewhat to the contrary. We find no improper statements by the court in the record and nothing to indicate that the court demonstrated any impropriety or gave consideration to any improper facts at the time sentence was imposed.[2]

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[2] The following excerpts are from the record:

"Court: Does the Government have anything to say to the Court at this time before I call on the defendants to tell me whatever they want to say or their lawyers or friends want to tell me in their behalf?

"Mr. Schwartz: Your Honor, I believe the Court has heard the facts tried following these gentlemen's pleas.

"If it please the Court, at the conclusion of the defendant's statements if there are any matters which are called upon for an answer, we would respectfully request permission to answer them then, but we think there is no other statement called for in the case.

"The Court: I will not say that I will at this time.

I will call the first on the docket, Mr. Blocker first, and then Mr. Lott and Mr. Frazer." (Tr. pp. 488-9)

* * * *

"Mr. Crooker: Your Honor, you have been good enough not to limit our number of witnesses. You said you would listen as long as we put them on.

The Court: Until exhaustion.

"Mr. Crooker: I want to be fair. I have a couple more, but aside from strictly character witnesses I want to use Mr. Brigman on a few brief facts independent of character, and I believe I am going to forego the others, but unless Your Honor wants to question them I shall not offer them.

"The Court: It is your own ruling." (Tr. pp. 502-3)

Following is from statement to the court by Appellant Blocker:

"I have made some mistakes in these matters, and as I say for some time now I have recognized that fully, and I want to make that very clear to Your Honor that I do recognize it.

Looking back over what went on, I am sorry that when things were presented in an improper manner that I didn't just leave the services of the company and find employment elsewhere, but hindsight is — it is just a matter of hindsight, and it is hard to lean on that at this time.

"I will say this, today, and as far as anything in the future is concerned, I would definitely leave the services of a company before I would ever do anything, if called upon, in an improper manner.

"I am not attempting at this time in any way to whitewash what I have done in the past. For quite a long time now I have been tortured more, much more, than could possibly be done by what would be done in a Court. I own up to any improprieties that may have been permitted to exist.

"The Court: Is there any doubt in your mind about that, you used the word 'might'?

"Mr. Blocker: There is no doubt at all, Your Honor. I didn't intend to use that word.

"There are improprieties that exist.

"There is one other thing that occurs to me that you might wonder about, why if I had objection to accounting irregularities, as I pointed out, why would I have let some amount of work be done by the company out at my house in 1951, which I did at that time." (Tr. pp. 521-2)

* * * *

"I would like to say though that I filed a plea of nolo contendere with the effect of throwing myself on the mercy of the Court, and what I have said here today is to reaffirm that, and I have not regretted what I have done.

"The Court: You mean the irregularity part or the nolo plea?

"Mr. Blocker: That I have not regretted filing the nolo plea, Your Honor." (Tr. p. 523)

Mr. Crooker (of counsel) speaking to the Court;

"Mr. Crooker: I wanted to say something, but I hadn't expected the occasion to arise so quickly. What I wanted to say, Your Honor, is two or three things about the matter.

"I wanted to remark to Your Honor what you doubtless know without my suggesting it to you or reminding you of it, that any man who enters a plea of nolo contendere, there are wonderful advantages to it. If I were doing it today I would do just exactly that, I would advise these clients of ours to do precisely what they did, and knowing that I am going to say about it is intended to not take anything from exactly what they did here in open Court. They are standing by it and so am I.

"I make that remark, although don't think it is necessary to do it, but when a trial goes on in the absence of any man, even though it was set up that way himself, and with his lawyer, too, but it goes on and we do not know what was brought out —

"The Court: Right on that point, counsel, didn't you have this young man present every day and every hour taking down notes?

"Mr. Crooker: Yes, I have everything, a daily report and everything that I had. That is not what I was going to suggest. I know what exactly was testified, in substance. He is not a shorthand reporter. We didn't buy a copy of it. We did buy

In this aspect of the case the insistence of the appellants is clearly erroneous. The shoe is on the other foot. The court gave every consideration requested by the appellants. In the first place, the court was not bound to ac-

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one witness, I think, but we have a daily report." (Tr. pp. 524-5) Following is statement to the Court by Appellant Lott:

"Mr. Moody: Your Honor, Mr. Lott would like to address the Court.

"Mr. Lott: Judge, I realize that I have made a great mistake and that I should have had the courage to have gotten out in 1953 when some of the younger fellows did.

"The Court: That could be the first statement of remorse or repentance that I have heard during these last eleven weeks. Maybe I did hear, but I don't remember. Go ahead.

"Mr. Lott: I had worked for Farnsworth & Chambers Company and Farnsworth originally all of my life, and frankly I didn't know anything else.

"I realize that I made a great mistake and I shall never recover from it, and I shall never make a mistake again." (Tr. pp. 531-2)

Mr. Moody (of counsel) speaking to the Court:

"I will be brief as possible, and I will not go over a rehash of the evidence that the Court sat through for nine weeks and heard. Certainly our pleading nolo did not contribute to the length of the trial, and we had hoped this thing would be over sooner, but it was not." (Tr. p. 533)

Mr. Ballew (of counsel) speaking to the Court:

"This man has made some great mistakes while at the company. He has not tried to deny them. He feels that it has been a bitter shame on his family.

"I have every confidence that this man has learned a rather bitter lesson.

"Let me say by way of mitigation, when we got into this criminal aspect of his life, it was in August of 1957 and we did not see this dark cloud coming at any time until the day before. He insisted upon talking to Mr. Gromatzky. At that time I think I was the one lawyer in the firm most closely associated with Mr. Lott, and it was I that went to Dallas to see the Internal Revenue Service on his behalf and later went to Washington, D. C." (Tr. pp. 539-40)

* * * *

"I personally know that this man made a bad decision back in '52 and '53. He is ashamed of what he did then, and he is regretful that he didn't get out of the company like Frank Glass did and Louis Spaw." . . . . (Tr. p. 541)

Dr. E. H. Westmoreland, a witness called on behalf of Lott speaking to the Court:

"The Witness: I would like to say that every member of our congregation would come here as a witness in his behalf, and they would say he is one of the cleanest Christian men we have ever known.

"The Court: But none of them were present during the ten weeks of testimony, were they?

"The Witness: Not that I know of, sir." (Tr. pp. 550-1)

cept the pleas of nolo contendere, especially in view of the objection by the Government. At the time the plea was entered, the appellants were warned in great detail and after ordering a pre-sentencing investigation, in effect stated that sentence would be imposed at the conclusion of the entire case. Counsel for the Government made slight reference to the Farnsworth trial and did not cross-examine the appellants' character witnesses. The court imposed no limitation on any of the appellants as to the number of character witnesses offered, and permitted full statements by both counsel and appellants. Two of the appellants made statements to the court. As a matter of fact, reference made by counsel for the appellants to the Farnsworth trial is far more extensive than any reference made by the court or counsel for the Government. As to this contention, we cannot better state our conclusion now than to quote from the decision of this court when the case was here on another question (280 F. 2d 24, 28-29):

> "In considering the contention of the appellants that they were sentenced upon a determination of guilt based upon the evidence at the trial of the other defendants rather than upon their pleas of nolo contendere, a look at the record becomes desirable. What happened is this; during the proceedings for sentencing the court heard statements of counsel for the appellants seeking mitigation of punishment. In these statements references were frequent to matters which transpired at the trial of the other defendants. It was brought out that counsel for the appellants had a representative at the trial, taking notes, and reporting to counsel so that they knew, in the words of one of the attorneys 'exactly what was testified, in substance.' Two of the three appellants made statements on behalf of themselves. Character witnesses numbering five, seven, and five, for the respective appellants, testified. At the conclusion of the hearing the court stated, 'I have found each guilty of the felonies as contained in the grand

jury indictment.' Then followed an oral pronouncement by the court of the sentences. This hearing was on June 19, 1959. On June 22, 1959, the court entered, as to each appellant, a formal judgment and commitment. From them we quote:

> It is adjudged that the defendant has been convicted upon his plea of nolo contendere of the offense of * * * and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,
>
> It is adjudged that the defendant is guilty as charged and convicted.

We need not consider whether the judgment was the oral pronouncement of sentence or the formal writing. Cf. Pollard v. United States, 352 U. S., 354, 77 S. Ct. 481, 1 L. Ed. 2d 303; United States v. Hark, 320 U. S. 531, 64 S. Ct. 359, 88 L. Ed. 290; Patterson v. United States, 5th Cir. 1950, 183 F. 2d 687; Spriggs v. United States, 9th Cir. 1955, 225 F. 2d 865. In neither the oral sentence nor the formal judgment does it appear that the determination of guilt is based upon the trial of the other defendants. Any such conclusion is negatived by recital in the formal judgment that 'the defendant has been convicted upon his plea of nolo contendere.' We see no merit in this contention of the appellants."

IV.

The Judgment of the Court

At the conclusion of the statements and evidence offered by the appellants, the court made the following oral pronouncement: "I have found each guilty of the felonies as contained in the Grand Jury indictment." In its formal written judgment, the court refers to the offenses as ". . . the offenses of filing false and fraudulent income tax

returns . . ." and ". . . conspiracy to file false and fraudulent income tax returns". Immediately following these statements by the court in the formal written judgments is the specific statement that the appellants had violated the felony provisions relating to willfully attempted evasion — § 145(b) 1939 Code and § 7201 1954 Code. The judgments make no specific reference to § 145(a) of the 1939 Code and §§ 7203 and 7207 of the 1954 Code which are the misdemeanor sections. Based on the misuse of language in the characterization of the offenses in the formal written judgments, the appellants insist that they were convicted of misdemeanors, but given sentences as provided in the felony sections. It is clear to us that the record clearly demonstrates that the intent of the district judge was to sentence appellants for the felonies for which they had been indicted. Such was the oral pronouncement of the court and regardless of the characterization of the offenses, the judgments show they were convicted of violating the felony sections as charged in the indictment. The error is almost self-correcting and it is certainly nothing more than a clerical error. This clerical error properly may be called to the attention of the trial judge, if the appellants desire to do so, under the provisions of F. R. Crim. P. No. 36,[3] which authorizes the correction of such errors by the sentencing court at any time. *Costello* v. *United States*, 252 F. 2d 750, 751 (C.A. 5th); *Tseung Chu* v. *Cornell*, 247 F. 2d 929, 932 (C.A. 9th); *Ex parte Sherwood*, 177 F. Supp. 411, 413 (Ore.), certiorari denied, 363 U. S. 851.

As a matter of fact, under the provisions of Rule 35, the court may correct an illegal sentence at any time; and may

[3] "Rule 36. Clerical Mistakes. Clerical mistakes in judgments, orders or other part of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders."

reduce the sentence within 60 days after receipt by the court of a mandate issued upon affirmance of judgment or dismissal of the appeal. Needless to say, the reduction of a valid sentence after affirmance is within the discretion of the trial court. Substantial time has elapsed since the appellants were sentenced. No doubt, the distinguished trial judge has given consideration to the sentences imposed. Considerations based on compassion and mercy are to be determined by the trial court.

As stated by this court in *Benham* v. *U. S.*, (1954) 215 F. 2d 472:

> "Each case stands upon its own peculiar facts and circumstances as to whether a defendant has been afforded a fair trial."

We have carefully reviewed the record and the numerous briefs filed in this case. We are convinced that all of the appellants were accorded every legal consideration to which they were entitled. We understand their disappointment, but the sentences received are not the maximum. Commendably, counsel for the appellants, in the highest traditions of advocacy, loyalty to the interest of their clients, and with a firm determination to press every conceivable point, have done everything possible for these appellants. The record not only shows that competent attention and advice were given to each appellant, but under the careful guidance of the court when the pleas were entered, and at the session of the court when sentences were pronounced, each appellant individually approved all action taken with full knowledge of the possible consequences.

The judgment is

AFFIRMED.

Court of Appeals Judgment on Remand

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
October Term, 1961

No. 17,888

D. C. DOCKET No. 13,298 — CRIMINAL

H. A. LOTT, LEE BLOCKER AND LORN D. FRAZIER,
Appellants,

VERSUS

UNITED STATES OF AMERICA,
Appellee.

Appeals from the United States District Court for the Southern District of Texas.

Before TUTTLE, Chief Judge, POPE and GEWIN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

September 25, 1962

Issued:

Judgment and Commitment — H. A. Lott

Filed Jun. 22, 1959.

United States District Court for the Southern District of Texas, Houston Division.

United States of America,

v. No. Cr. 13298.

H. A. Lott

On the 19th day of June, 1959 came the attorney for the government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been convicted upon his plea of nolo contendere of the offense of filing false and fraudulent corporate income tax returns, in violation of Title 26, U. S. Code, Section 145(b), as charged in Counts 1, 2 and 3, and in violation of Title 26 U. S. Code, Section 7201, as charged in Count 4; and the offense of conspiring to file false and fraudulent corporate income tax returns, in violation of Title 18, U. S. Code, Section 371, as charged in Count 5; and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) Years on each of Counts 1, 2, 3, 4 and 5, to run concurrently, making a total of two years.

It Is Further Adjudged that the defendant is hereby fined the sums of Two Thousand Five Hundred ($2,500.00) Dollars on Count 1, Two Thousand Five Hundred ($2,500.00) Dollars on Count 2, Five Thousand ($5000.00) Dollars on Count 3, Five Thousand ($5,000.00) Dollars on Count 4, and Five Thousand ($5,000.00) Dollars on Count 5, to run consecutively making a total of $20,000.00.

It Is Adjudged that the United States of America shall recover from the defendant the sum of $20,000.00, named above, for which execution may issue. In default of payment of said fine, the defendant is to be further committed until the fine is paid or until he shall be otherwise lawfully discharged.

It Is Ordered that the defendant is to report to the United States Marshal at 10:00 A.M., on July 20, 1959, to begin service of this sentence.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Done the 22nd day of June, 1959.

ALLEN B. HANNAY,
United States District Judge.

The Court recommends commitment to: Seagoville, Texas.

Approved: F.L.H.

Judgment and Commitment — Lee Blocker

Filed Jun. 22, 1959.

United States District Court for the Southern District of Texas, Houston Division.

United States of America,

v. No. Cr: 13298.

Lee Blocker.

On the 19th day of June, 1959 came the attorney for the government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been convicted upon his plea of nolo contendere of the offense of filing false and fraudulent corporate income tax returns, in violation of Title 26, U. S. Code, Section 145(b), as charged in Counts 1, 2 and 3, and in violation of Title 26 U. S. Code, Section 7201, as charged in Count 4; and the offense of conspiring to file false and fraudulent corporate income tax returns, in violation of Title 18, U. S. Code, Section 371, as charged in Count 5; and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Three (3) Years on each of Counts 1, 2, 3, 4 and 5, to run concurrently, making a total of three years.

It Is Further Adjudged that the defendant is hereby fined the sums of Two Thousand Five Hundred ($2,500.00) Dollars on Count 1, Two Thousand Five Hundred ($2,500.00) Dollars on Count 2, Five Thousand ($5,000.00) Dollars on Count 3, Five Thousand ($5,000.00) Dollars on Count 4, and Five Thousand ($5,000.00) Dollars on Count 5, to run consecutively making a total of $20,000.00.

It Is Adjudged that the United States of America shall recover from the defendant the sum of $20,000.00, named above, for which execution may issue. In default of payment of said fine, the defendant is to be further committed until the fine is paid or until he shall be otherwise lawfully discharged.

It Is Ordered that the defendant is to report to the United States Marshal at 10:00 A.M., on July 20, 1959, to begin service of this sentence.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Done the 22nd day of June, 1959.

ALLEN B. HANNAY,
United States District Judge.

The Court recommends commitment to: Seagoville, Texas.

Approved. F.L.H.

Judgment and Commitment — Lorn D. Frazier

Filed Jun. 22, 1959.

United States District Court for the Southern District of Texas, Houston Division.

United States of America,

v. No. Cr. 13298.

Lorn D. Frazier.

On the 19th day of June, 1959 came the attorney for the government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been convicted upon his plea of nolo contendere of the offense of filing false and fraudulent corporate income tax returns, in violation of Title 26, U. S. Code, Section 145(b), as charged in Counts 1, 2 and 3, and in violation of Title 26 U. S. Code, Section 7201, as charged in Count 4; and the offense of conspiring to file false and fraudulent corporate income tax returns, in violation of Title 18, U. S. Code, Section 371, as charged in Count 5; and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) Years on each of Counts 1, 2, 3, 4 and 5, to run concurrently, making a total of two years.

It Is Further Adjudged that the defendant is hereby fined the sums of Two Thousand Five Hundred ($2,500.00) Dollars on Count 1, Two Thousand Five Hundred ($2,500.00) Dollars on Count 2, Five Thousand ($5,000.00) Dollars on Count 3, Five Thousand ($5,000.00) Dollars on Count 4, and Five Thousand ($5,000.00) Dollars on Count 5, to run consecutively making a total of $20,000.00.

It Is Adjudged that the United States of America shall recover from the defendant the sum of $20,000.00, named above, for which execution may issue. In default of payment of said fine, the defendant is to be further committed until the fine is paid or until he shall be otherwise lawfully discharged.

It Is Ordered that the defendant is to report to the United States Marshal at 10:00 A.M., on July 20, 1959, to begin service of this sentence.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Done the 22nd day of June, 1959.

ALLEN B. HANNAY,
United States District Judge.

The Court recommends commitment to: Seagoville, Texas.

Approved: F.L.H.

Appendix C

INDICTMENT

Filed April 14, 1958
United States District Court
Southern District of Texas,
Houston Division.

United States of America,

vs.

Cr. No. 13298.

Richard A. Farnsworth, Sr., Lee Blocker, H. A. Lott, Alan Farnsworth and Lorn D. Frazier

The Grand Jury Charges:

That in the Houston Division of the Southern District of Texas and within the jurisdiction of this Court, one RICHARD A. FARNSWORTH, SR., Chairman of the Board of Directors of Farnsworth & Chambers Company, Inc., LEE BLOCKER, Treasurer of Farnsworth & Chambers Company, Inc. H. A. LOTT, Vice President of Farnsworth & Chambers Company, Inc., ALAN FARNSWORTH, Purchasing Agent and Employee of Farnsworth & Chambers Company, Inc., and LORN D. FRAZIER, Vice President of Farnsworth & Chambers Company, Inc., all hereinafter called defendants and all respectively in the year 1951 were employed by Farnsworth & Chambers Company, Inc., a corporation engaged in the general contracting business in the State of Texas by virtue of a permit issued by the State of Texas, did wilfully and knowingly attempt to evade and defeat a large part of the taxes due and owing by Farnsworth & Chambers Company, Inc. to the United States of America for the calendar year 1951, by falsifying and altering, and causing to be falsified and altered, invoices, books and records, memorandums, and other documents of Farnsworth & Chambers Company, Inc. at Houston, Texas, and approving and causing to be approved false invoices and documents at Houston, Texas,

and concealing and causing to be concealed assets of Farnsworth & Chambers Company, Inc. at Houston, Texas, and diverting and causing to be diverted net income of Farnsworth & Chambers Company, Inc. at Houston, Texas, and concealing and causing to be concealed income of Farnsworth & Chambers Company, Inc. at Houston, Texas, and preparing and causing to be prepared, and mailing and causing to be mailed at Houston, Texas, a false and fraudulent corporate income tax return on behalf of Farnsworth & Chambers Company, Inc. at Houston, Texas for the calendar year of 1951, which was filed on or about April 16, 1952 with the Collector of Internal Revenue for the First Internal Revenue District at Austin, Texas, wherein it was stated that the net income of the said corporation for the said calendar year of 1951 was the sum of $399,135.98; and that the total amount of tax due thereon was the sum of $194,482.66, whereas, as they then and there well knew the net income of the corporation for the said calendar year of 1951 was the sum of $763,599.62 upon which said net income the corporation owed to the United States of America a total tax of $482,278.96, in violation of Section 145(b) of the Internal Revenue Code of 1939: 26 U.S.C. 145(b).

Second Count

That in the Houston Division of the Southern District of Texas and within the jurisdiction of this Court, one RICHARD A. FARNSWORTH, SR., Chairman of the Board of Directors of Farnsworth & Chambers Company, Inc., LEE BLOCKER, Treasurer of Farnsworth & Chambers Company, Inc. H. A. LOTT, Vice President of Farnsworth & Chambers Company, Inc., ALAN FARNSWORTH, Purchasing Agent and Employee of Farnsworth & Chambers Company, Inc., and LORN D. FRAZIER, Vice President of Farnsworth & Chambers Company, Inc., all hereinafter called defendants and all respectively in the year 1952 were employed by Farnsworth & Chambers Company, Inc., a corporation engaged in the

general contracting business in the State of Texas by virtue of a permit issued by the State of Texas, did wilfully and knowingly attempt to evade and defeat a large part of the taxes due and owing by Farnsworth & Chambers Company, Inc. to the United States of America for the calendar year 1952, by falsifying and altering, and causing to be falsified and altered, invoices, books and records, memorandums, and other documents of Farnsworth & Chambers Company, Inc. at Houston, Texas, and approving and causing to be approved false invoices and documents at Houston, Texas, and concealing and causing to be concealed assets of Farnsworth & Chambers Company, Inc. at Houston, Texas, and diverting and causing to be diverted net income of Farnsworth & Chambers Company, Inc. at Houston, Texas, and concealing and causing to be concealed income of Farnsworth & Chambers Company, Inc. at Houston, Texas, and preparing and causing to be prepared, and mailing and causing to be mailed at Houston, Texas, a false and fraudulent corporate income tax return on behalf of Farnsworth & Chambers Company, Inc. at Houston, Texas for the calendar year of 1952, which was filed on or about May 12, 1953 with the District Director of Internal Revenue for the Austin District of the Internal Revenue Service at Austin, Texas, wherein it was stated that the net income of the said corporation for the said calendar year of 1952 was the sum of $410,937.87, and that the total amount of tax due thereon was the sum of $207,135.40; whereas, as they then and there well knew the net income of the corporation for the said calendar year of 1952 was the sum of $495,528.77, upon which said net income the corporation owed to the United States of America a total tax of $251,122.66, in violation of Section 145(b) of the Internal Revenue Code of 1939; 26 U.S.C. 145(b).

Third Count

That in the Houston Division of the Southern District of Texas and within the jurisdiction of this Court, one RICHARD

A. FARNSWORTH, SR.; Chairman of the Board of Directors of Farnsworth & Chambers Company, Inc., LEE BLOCKER, Treasurer of Farnsworth & Chambers Company, Inc., H. A. LOTT, Vice President of Farnsworth & Chambers Company, Inc., ALAN FARNSWORTH, Purchasing Agent and Employee of Farnsworth & Chambers Company, Inc., and LORN D. FRAZIER, Vice President of Farnsworth & Chambers Company, Inc., all hereinafter called defendants and all respectively in the year 1953 were employed by Farnsworth & Chambers Company, Inc., a corporation engaged in the general contracting business in the State of Texas by virtue of a permit issued by the State of Texas, did wilfully and knowingly attempt to evade and defeat a large part of the taxes due and owing by Farnsworth & Chambers Company, Inc. to the United States of America for the calendar year 1953, by falsifying and altering, and causing to be falsified and altered, invoices, books and records, memorandums, and other documents of Farnsworth & Chambers Company, Inc. at Houston, Texas, and approving and causing to be approved false invoices and documents at Houston, Texas, and concealing and causing to be concealed assets of Farnsworth & Chambers Company, Inc. at Houston, Texas, and diverting and causing to be diverted net income of Farnsworth & Chambers Company, Inc. at Houston, Texas, and concealing and causing to be concealed income of Farnsworth & Chambers Company, Inc. at Houston, Texas, and preparing and causing to be prepared, and mailing and causing to be mailed at Houston, Texas, a false and fraudulent corporate income tax return on behalf of Farnsworth & Chambers Company, Inc. at Houston, Texas for the calendar year of 1953, which was filed on or about May 24, 1954 with the District Director of Internal Revenue for the Austin District of the Internal Revenue Service at Austin, Texas, wherein it was stated that the net income of the said corporation for the said calendar year of 1953 was the sum of $179,628.93, and that the total amount of tax

due thereon was the sum of $87,907.04, whereas, as they then and there well knew the net income of the corporation for the said calendar year of 1953 was the sum of $362,929.90, upon which said net income the corporation owed to the United States of America a total tax of $183,223.55, in violation of Section 145(b) of the Internal Revenue Code of 1939: 26 U.S.C. 145(b).

Fourth Count

That in the Houston Division of the Southern District of Texas and within the jurisdiction of this Court, one RICHARD A. FARNSWORTH, SR., Chairman of the Board of Directors of Farnsworth & Chambers Company, Inc., LEE BLOCKER, Treasurer of Farnsworth & Chambers Company, Inc., H. A. LOTT, Vice President of Farnsworth & Chambers Company, Inc., ALAN FARNSWORTH, Purchasing Agent and Employee of Farnsworth & Chambers Company, Inc., and LORN D. FRAZIER, Vice President of Farnsworth & Chambers Company, Inc., all hereinafter called defendants and all respectively in the year 1954 were employed by Farnsworth & Chambers Company, Inc., a corporation engaged in the general contracting business in the State of Texas by virtue of a permit issued by the State of Texas, did wilfully and knowingly attempt to evade and defeat a large part of the taxes due and owing by Farnsworth & Chambers Company, Inc. to the United States of America for the calendar year 1954, by falsifying and altering, and causing to be falsified and altered, invoices, books and records, memorandums, and other documents of Farnsworth & Chambers Company, Inc. at Houston, Texas, and approving and causing to be approved false invoices and documents at Houston, Texas, and concealing and causing to be concealed assets of Farnsworth & Chambers Company, Inc. at Houston, Texas, and diverting and causing to be diverted net income of Farnsworth & Chambers Company, Inc. at Houston, Texas, and concealing and causing to be concealed income of Farns-

worth & Chambers Company, Inc. at Houston, Texas, and preparing and causing to be prepared, and mailing and causing to be mailed at Houston, Texas, a false and fraudulent corporate income tax return on behalf of Farnsworth & Chambers Company, Inc. at Houston, Texas for the calendar year of 1954, which was filed on or about March 14, 1955 with the District Director of Internal Revenue for the Austin District of the Internal Revenue Service at Austin, Texas, wherein it was stated that the net income of the said corporation for the said calendar year of 1954 was the sum of $282,441.03, and that the total amount of tax due thereon was the sum of $135,797.53, whereas, as they then and there well knew the net income of the corporation for the said calendar year of 1954 was the sum of $406,898.80, upon which said net income the corporation owed to the United States of America a total tax of $200,515.57, in violation of Section 7201 of the Internal Revenue Code of 1954: 26 U.S.C. 7201.

Fifth Count

That on or about the 1st day of January of 1950, the exact date to the Grand Jurors unknown and continuously thereafter up unto and including the 14th day of March of 1955, in the Southern District of Texas, Houston Division and within the jurisdiction of this Court and other Judicial Districts of the United States of America, RICHARD A. FARNSWORTH, SR., LEE BLOCKER, H. A. LOTT, LORN D. FRAZIER, and ALAN FARNSWORTH, all of Houston, Texas, all hereinafter called defendants, did unlawfully, knowingly, wilfully and feloniously conspire, combine, confederate and agree together, with each other and Dunbar N. Chambers, deceased, not indicted herein, and divers other persons whose names are to the Grand Jurors unknown to violate Section 145 (b) of the Internal Revenue Code of 1939, Section 145 (b), Title 26, United States Code and Section 7201 of the Internal Revenue Code of 1954, Sec-

tion 7201, Title 26, United States Code, to-wit: To wilfully attempt to evade and defeat a large part of the income taxes due and owing to the United States of America by Farnsworth & Chambers Company, Inc. for the calendar years of 1951, 1952, 1953 and 1954 under circumstances and by the means and other manner following:

That at all times material herein:

1. Farnsworth & Chambers Company, Inc., a corporation engaged in the business of general contracting work in the State of Texas, as permitted by the State of Texas, with its principal office in Texas situated at Houston, Texas;

2. Richard A. Farnsworth, Sr. was Chairman of the Board of Directors of Farnsworth & Chambers Company, Inc.;

3. Lee Blocker was Treasurer of Farnsworth & Chambers Company, Inc.;

4. H. A. Lott was Vice President of Farnsworth & Chambers Company, Inc.;

5. Lorn D. Frazier was Vice President of Farnsworth & Chambers Company, Inc., and

6. Alan Farnsworth was Purchasing Agent and Employee of Farnsworth & Chambers Company, Inc.

A. It was part of said conspiracy to falsify and alter books and records, memorandums, bills and receipts and documents of Farnsworth & Chambers Company, Inc.

B. It was further a part of the conspiracy to approve falsified invoices, bills, memorandums and documents for payment by Farnsworth & Chambers Company, Inc.

C. It was further a part of the conspiracy that defendants would conceal purchases of assets of Farnsworth & Chambers Company, Inc. by representing that payments for such assets were for rentals, repair expenses, parts expenses and materials used in construction work by Farnsworth & Chambers Company, Inc.

D. It was further a part of the conspiracy to alter and delete the true records of the corporation for the purpose of concealing the true net income of the corporation.

That the Grand Jurors further charge that at the times and at the places herein named, in furtherance of the object, design and purpose of such conspiracy, the defendants hereinafter named did do and perform the following overt acts:

Overt Acts

1. Each of the overt acts alleged in the preceding four counts of this indictment, in the respective dates and places alleged therein.

2. That on or about April 16, 1952, Richard A. Farnsworth, Sr., Lee Blocker, H. A. Lott, Alan Farnsworth and Lorn D. Frazier filed and caused to be filed a corporate income tax return on behalf of Farnsworth & Chambers Company, Inc. with the Collector of Internal Revenue for the First Internal Revenue District at Austin, Texas.

3. That on or about May 12, 1953, Richard A. Farnsworth, Sr., Lee Blocker, H. A. Lott, Alan Farnsworth and Lorn D. Frazier filed and caused to be filed a corporate income tax return on behalf of Farnsworth & Chambers Company, Inc. with the District Director of Internal Revenue for the Austin District of the Internal Revenue Service at Austin, Texas.

4. That on or about May 24, 1954, Richard A. Farnsworth, Sr., Lee Blocker, H. A. Lott, Alan Farnsworth and Lorn D. Frazier filed and caused to be filed a corporate income tax return on behalf of Farnsworth & Chambers Company, Inc. with the District Director of Internal Revenue for the Austin District of the Internal Revenue Service at Austin, Texas.

5. That on or about March 14, 1955, Richard A. Farnsworth, Sr., Lee Blocker, H. A. Lott, Alan Farnsworth and Lorn D. Frazier filed and caused to be filed a corporate income tax return on behalf of Farnsworth & Cham-

bers Company, Inc., with the District Director of Internal Revenue for the Austin District of the Internal Revenue Service at Austin, Texas.

6. On or about June 5, 1951, Richard A. Farnsworth, Sr. approved an invoice labeled "Requisition No. 12" showing Al Bubeck to be payee.

7. On or about December 31, 1951, Richard A. Farnsworth, Sr. in Houston, Texas, approved Voucher No. 47071 payable to Acme Airco No. 1 for one Amana freezer.

8. On or about January 24, 1953 in Houston, Texas, Richard A. Farnsworth, Sr. approved Voucher No. 70860 for work on a residence.

9. On or about May 4, 1954, Richard A. Farnsworth, Sr. at Houston, Texas, approved an invoice supporting Voucher No. 07490.

10. On or about April 28, 1952, Lorn D. Frazier approved an alleged invoice from Sim D. Brown.

11. On or about November 1, 1953, Lorn D. Frazier approved an alleged invoice from Herman Knox Furniture Company.

12. On or about November 25, 1952, Lorn D. Frazier approved an invoice from B. A. Hoffman.

13. On or about November 29, 1950, H. A. Lott approved Invoice No. 31701 from the National Sash and Door Company.

14. On or about May 15, 1951, H. A. Lott approved Invoice No. 10338 from the Coastal Equipment Company, Inc.

15. On or about February 25, 1952, H. A. Lott approved an alleged invoice from Sim D. Brown.

16. On or about September 26, 1953, H. A. Lott approved an invoice from G. V. Robles & Sons.

17. On or about March 31, 1954, H. A. Lott approved an alleged invoice from the Alamo Lumber Company.

18. On or about May 7, 1953, Lee Blocker at Houston, Texas, signed his name to the 1952 Corporation Income Tax Return as Treasurer of Farnsworth & Chambers Company, Inc.

19. On or about May 10, 1954, Lee Blocker at Houston, Texas, signed his name to the 1953 Corporation Income Tax Return as Treasurer of Farnsworth & Chambers Company, Inc.

20. On or about March 8, 1955, Lee Blocker at Houston, Texas, signed his name to the 1954 Corporation Income Tax Return as Treasurer of Farnsworth & Chambers Company, Inc.

21. On or about November 1, 1950, Lee Blocker approved Invoice No. 3664 alleged to be from the Coastal Equipment Company, Inc.

22. On or about December 31, 1951, Lee Blocker prepared Journal Voucher 654.

23. On or about June 2, 1951, Alan Farnsworth approved an invoice from the Hollywood Overhead Door Co.

24. On or about February 25, 1951, Alan Farnsworth approved a weekly field payroll charged to the Reagan School job.

25. On or about May 19, 1953, Alan Farnsworth approved an invoice from the Houston Iron & Steel Company.

26. On or about January 2, 1954, Alan Farnsworth approved an invoice from the Barber, Inc.

That the acts aforesaid were and are in violation of Section 371, Title 18, United States Code.

/s/ ED HELMAN
Foreman of the Grand Jury

/s/ FRED L. HARTMAN
Assistant United States Attorney.

Appendix D

NEWSPAPER ARTICLE

PAGE 16, SECTION 1 THE HOUSTON POST

SUNDAY, MAY 22, 1960

Area U.S. Judges Rule Out Pleas of 'Nolo Contendere'

Federal judges in the Southern District of Texas will no longer accept pleas of nolo contendere from individuals charged with felony offenses, U. S. District Judge Allen B. Hannay confirmed Saturday.

The new policy came to light when Johnny B. Watkins, through his attorney, Gabriel M. Nahas, attempted to enter the plea to charges of making a false statement in a job application to the Post Office here.

FEDERAL JUDGE Joe Ingraham refused to accept the plea, saying that the district judges had agreed to take nolo contendere pleas only in some cases involving corporations and misdemeanors.

Nahas then entered a plea of innocent for his client.

In the past a number of persons charged with felonies have entered the plea, which means that they will accept the judgment of the court without admitting guilt or innocence.

Most of the judges have privately considered a nolo contendere plea an out for defendants who do not want to stand in court and say that they have been guilty of a crime.

THE PLEA IS particularly important to corporations which have been charged with civil as well as criminal actions in the same case, such as tax frauds.

A guilty plea in the criminal tax action, which is always tried first, can be used against the defendant later in a civil trial.

Whether or not a nolo contendere plea will be accepted is left to the discretion of the judges in a particular federal district.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 551

H. A. LOTT, LEE BLOCKER AND LORN D. FRAZIER,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 7a–28a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 25, 1962 (Pet. 29a). The petition for a writ of certiorari was filed on October 23, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment charges petitioners with the offense of having wilfully attempted to evade the

corporate tax and with conspiracy to commit the substantive offense.

2. Whether the three-month delay in sentencing petitioners, during which time the sentencing judge presided at the trial of others charged in the indictment, was unreasonable and denied petitioners due process of law.

3. Whether, in convicting and sentencing defendants on pleas of *nolo contendere*, the trial judge wrongfully considered evidence introduced in the trial of petitioners' co-defendants.

4. Whether a formal judgment clearly stating the statute violated and the sentence imposed is rendered null and void because of allegedly inaccurate recitals as to the manner of violating the statute.

STATUTES AND RULES INVOLVED

The relevant provisions of the Internal Revenue Codes of 1939 and 1954, 18 U.S.C. 371, and Rule 36 of the Federal Rules of Criminal Procedure are set forth in the Appendix, *infra*, pp. 17–19.

STATEMENT

On April 14, 1958, the three petitioners, plus Richard and Allan Farnsworth, were indicted (1) for having wilfully attempted to evade the taxes of the Farnsworth and Chambers Company, Inc., for the years 1951 through 1954 in violation of Section 145(b) and 7201 of the Internal Revenue Codes of 1939 and 1954 (counts 1–4); and (2) for conspiracy to commit these substantive offenses in violation of 18 U.S.C. 371 (count 5) (R. 11–23). The defendants were identified as various officers and employees of

the corporation. The evasion counts stated that the defendants had falsified records, approved false invoices, concealed corporate assets and income, diverted corporate income and caused the preparation and mailing of returns which, as the defendants "then and there well knew," were false and fraudulent in that they stated a certain net income and tax whereas the corporation owed a larger tax on a larger net income. The substantive counts alleged the following amounts of reported and corrected net income and tax liability:

NET INCOME

Year	Reported	Corrected	Additional
1951	$399,135.98	$763,599.62	$364,463.64
1952	410,937.87	495,528.77	84,590.90
1953	179,628.93	362,929.90	183,300.97
1954	282,441.03	406,898.80	124,457.77
Total	1,272,143.81	2,028,957.09	756,813.28

TAX LIABILITY

Year	Reported	Corrected	Additional
1951	$194,482.66	$482,278.96	$287,796.30
1952	207,135.40	251,122.66	43,987.26
1953	87,907.04	183,223.55	95,316.51
1954	135,797.53	200,515.57	64,718.04
Total	625,322.63	1,117,140.74	491,818.11

Count 5 charged that the defendants conspired to violate Sections 145(b) and 7201 and alleged 26 overt acts, including, as to each defendant, the making and approving of false records, or the filing or signing of the false returns identified in the substantive counts.

A motion to dismiss was filed by petitioners Frazier and Blocker claiming that the acts attributable to the various individuals were not specified in the in-

dictment; the substantive counts were multifarious; the conspiracy count did not allege the conspiracy agreement; and the indictment failed to state an offense (R. 62–65). The motion was overruled (R. 346). Petitioners filed motions and briefs requesting a bill of particulars (R. 24–47, 80–123). The motions asked for the details of the acts alleged in the indictment. While this motion was denied (R. 346), the government voluntarily filed a bill of particulars (R. 219). A motion for additional particulars (R. 223) was denied (R. 347).

All five defendants entered pleas of not guilty on April 24, 1958 (R. 24). On March 17 and 20, 1959, the three petitioners withdrew their pleas and entered pleas of *nolo contendere,* which were accepted by the court over the opposition of the United States Attorney (R. 444, 466). Each petitioner pleaded *nolo contendere,* count by count, as the indictment was read to him verbatim, including the citation of the statutes violated. The court thoroughly interrogated each petitioner and warned him as to the seriousness of the charges and the possible sentence. Each petitioner admitted, *inter alia,* having received a copy of the indictment, that he had reviewed the indictment with counsel, that he understood it, that he knew the offenses charged were serious, and that the plea was entered on his own responsibility and not that of his attorney (R. 459, 479). The pleas were then received, and no attempt to withdraw these pleas was made until after prison terms had been imposed.

Upon entry of the pleas of *nolo contendere,* the cases were continued for pre-sentence investigation.

Sentencing was deferred until the conclusion of the entire case (R. 462, 464, 482, 483). Petitioners neither objected to postponement of sentence nor requested sentence. Trial of the other two defendants commenced on April 6, 1959, and ended on June 10, 1959, with a verdict acquitting Allan Farnsworth and disagreement as to Richard Farnsworth. Counsel for defendants Blocker and Frazier had an observer at the trial and had the benefit of all the testimony adduced, either verbatim or in substance (R. 525).

During the sentencing hearing, government counsel mentioned that the trial judge had "heard the facts tried" which were involved in the case (R. 488). No objection was made to this statement. The court then called on the three petitioners, their friends, and lawyers to make statements on behalf of petitioners (R. 488). Attorneys for all the petitioners cited testimony introduced during the long trial of the other defendants in their plea for leniency (R. 506, 526–528, 533–534, 537, 540). The trial court alluded to the testimony in the trial, generally in response to remarks of petitioners' counsel (R. 526, 527, 532, 537, 541, 550). All three petitioners, either personally or through counsel, admitted that they had been guilty of improprieties, and expressed regret and shame (R. 521–522, 531–532, 539, 541–542).

Prior to imposing sentence the Court stated (R. 551):

> I have found each guilty of the felonies as contained in the Grand Jury indictment.

Petitioners Frazier and Lott were sentenced to imprisonment for two years on each count, the sentences

to run concurrently, and fined a total of $20,000. Petitioner Blocker was sentenced to imprisonment for three years on each count, the sentence to run concurrently, and also fined a total of $20,000 (R. 553–559). The formal judgments filed on June 22, 1959 (R. 553–559) contained the following recital:

> It Is Adjudged that the defendant has been convicted upon his plea of nolo contendere of the offense of filing false and fraudulent corporate income tax returns, in violation of Title 26, U.S. Code, Section 145(b), as charged in Counts 1, 2, and 3, and in violation of Title 26, U.S. Code, Section 7201, as charged in Count 4; and the offense of conspiring to file false and fraudulent corporate income tax returns, in violation of Title 18 U.S. Code, Section 371, as charged in Count 5; and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,
>
> It Is Adjudged that the defendant is guilty as charged and convicted.

Petitioners filed motions in arrest of judgment. The motion for petitioner Lott claimed that the indictments failed to state an offense with the necessary certainty and that the conspiracy count did not allege a conspiracy agreement (R. 559–561). The motion for petitioners Blocker and Frazier, in addition to these contentions, also argued that the indictment did not apprise petitioners of the charges against them personally and that the substantive counts were multifarious (R. 563–566). Both these motions were denied (R. 568–569). Petitioners then filed motions arguing that the trial court should exercise its dis-

cretion to reduce or suspend sentence (R. 569–571, 616–620), which were likewise denied (R. 575–576). Petitioners Blocker and Frazier moved the trial court for a rehearing on the motion to arrest judgment, which raised no issues in addition to the original motion (R. 578–581, 622–642). The trial court denied the motion (R. 576).

The notice of appeal filed by petitioners specified that they had been convicted of attempted tax evasion in violation of Sections 145 and 7201 of the Internal Revenue Codes of 1939 and 1954, as well as of conspiracy in violation of 18 U.S.C. 371 (R. 572, 613). The statement of points on appeal of petitioners Blocker and Frazier stated that the indictments were defective because they failed to charge in sufficient detail the elements of the offense, all the counts were duplicitous, and the various counts failed to allege how the acts of petitioners could have caused a tax deficiency or how such deficiency did or would result (R. 643–645). Petitioner Lott's statement claimed, in addition, that the conspiracy count did not allege a conspiracy agreement, and the sentence was excessive (R. 646–649). The court of appeals dismissed petitioners' appeal on the ground that it was untimely. 280 F. 2d 24. This Court, however, reversed and remanded the case to the court of appeals for consideration on the merits. 367 U.S. 421. On remand, the court of appeals affirmed petitioners' convictions and sentences (Pet. 7a–28a).

ARGUMENT

Petitioners make four contentions: (1) the indictment was invalid because (a) it did not adequately

charge what part each petitioner had in the attempt to evade; (b) it did not charge any deficiency in the corporation's *payment* of taxes or that petitioners had knowledge of any such deficiency; (c) a conspiracy count cannot allege a single conspiracy to evade taxes for four separate years; and (d) the conspiracy count did not charge all the elements of the substantive offense; (2) the three-month delay between acceptance of their pleas of *nolo contendere* and sentence violated due process; (3) the trial judge, in convicting and sentencing petitioners, considered evidence adduced at the trial of their co-defendants; and (4) the formal judgment was null and void because it erred in describing the offenses. None of these issues, however, is properly before the Court.

First, petitioners failed even to mention in the trial court any of these issues they now raise, other than those related to the indictment in their motions to dismiss, motions in arrest of judgment, or in any other manner. While those motions did attack the indictment generally, this was not sufficient to bring the claims petitioners now make to the attention of the trial court. The only issue now argued by petitioners which was properly raised in the trial court was that the indictment should have alleged the acts of each individual petitioner.[1]

Second, petitioners in their notices of appeal again mentioned none of the issues they now raise except for their attack on the indictment. And even as to

[1] The court of appeals opinion (Pet. App. 20a) states that petitioners argued in that court that petitioner Lott asked to be sentenced prior to the trial of the co-defendants. The record shows no such request and we know of none.

the indictment, they did not argue that it was invalid because the conspiracy count failed to allege the elements of the substantive offense or that the indictment did not charge what petitioners did individually. Thus, petitioners abandoned the only issue which they raised in the district court on which they are relying before this Court.[2]

In short, none of the issues relied on by petitioners was properly raised and preserved. Moreover, those issues do not involve the jurisdiction of the trial court or the failure of the indictment to charge an offense—issues which, under Rule 12(b) of the Federal Rules of Criminal Procedure, may be raised at any time. While some of petitioners' arguments are phrased in jurisdictional terms, even if they were correct they would show no more than that the trial court erred. Similarly, it is clear that the indictment charged federal offenses; petitioners' contentions merely amount to the argument that the indictment should have been more specific in order to apprise them of the precise offenses charged.

In any event, assuming *arguendo*, that some or all of the issues petitioners argue are before the Court, we shall now show that they are without merit.

1. The indictment charged the substantive and conspiracy offenses in the language of the tax-evasion

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[2] Of the issues now raised by petitioners, two—the claims that the delay in sentencing was unconstitutional and that the conspiracy count was multifarious—were not raised when the case was first before this Court. Consequently, this is an independent reason why these issues cannot now be raised. *Christoffel* v. *United States*, 214 F. 2d 265 (C.A. D.C.), certiorari denied, 348 U.S. 850; see *Ballard* v. *United States*, 329 U.S. 187, 190.

statutes (Section 145(b) of the 1939 Code and Section 7201 of the 1954 Code) and of the conspiracy statute (18 U.S.C. 371). Accordingly, on its face it sufficiently charged the offenses to which petitioners pleaded (*United States* v. *Lepowitch*, 318 U.S. 702, 704; *Ekberg* v. *United States*, 167 F. 2d 380, 387 (C.A. 1)); further details were provided in the court's discretion, through a bill of particulars.

The indictment not only charged all of the essential elements of the offenses but did so in detail exceeding that of indictments approved repeatedly, over a long period of time, by numerous lower federal courts.[3] Although the indictment need not allege the manner of attempted evasion (*Reynolds* v. *United States*, 225 F. 2d 123, 126 (C.A. 5), certiorari denied, 350 U.S. 914; *United States* v. *Rosenblum*, 176 F. 2d 321, 324 (C.A. 7), certiorari denied, 338 U.S. 893), the indictment here set forth, specifically, many of the means used by petitioners. There is no basis in the statutes, in decisional law, or in reason, for petitioners' assertion (Pet. 14) that an indictment charging the attempted evasion of corporate taxes requires greater specificity than one charging the attempted evasion of individual income taxes. In short, the detailed allegations in the first four substantive counts of the indictment—as did the equally detailed allegations in the fifth count of the steps taken to consummate the conspiracy—constituted "plain, concise

[3] *E.g.*, *Rick* v. *United States*, 161 F. 2d 897, 898-899 (C.A. D.C.); *Gaunt* v. *United States*, 184 F. 2d 284, 288 (C.A. 1), certiorari denied, 340 U.S. 917; *Guzik* v. *United States*, 54 F. 2d 618, 619 (C.A. 7), certiorari denied, 285 U.S. 545.

and definite" statements of the respective offenses (Rule 7(c)) which, together with the bill of particulars, fully apprised petitioners of the nature of the charges to which they were called upon to respond.

There was no need for the indictment to allege the particular actions of each petitioner since, under 18 U.S.C. 2, a person can be guilty as an aider and abettor even if he himself did not commit the alleged acts. Consequently, an indictment need not specify whether a particular defendant is a principal or an accessory. *E.g., Jin Fuey Moy* v. *United States*, 254 U.S. 189. In any event, since it was not necessary that the indictment allege the means used by petitioners to commit the attempted evasion, it was *a fortiori* not necessary to allege which defendants engaged in the acts alleged.

There was also no need for the indictment to allege that the taxes actually paid by the corporation were deficient, since the gist of the offense defined by Sections 145(b) and 7201 is the wilful *attempt* to evade and defeat the tax. The offense is complete when a fraudulent return has been filed. Similarly, the indictment was not required to allege that petitioners had knowledge of any tax deficiency. It was enough that the indictment state, in the words of the statutes, that petitioners "did wilfully and knowingly attempt to evade and defeat" the tax, by filing a fraudulent return.

Concerning the conspiracy count, it was entirely proper to charge a conspiracy to evade taxes over four years. We can see no reason why a conspiracy to evade taxes, like any other conspiracy, cannot exist

over a period of years and have the purpose of committing several substantive offenses. This Court has held that an indictment charging such multiple objects is entirely proper.[4] *Braverman* v. *United States*, 317 U.S. 49. It is also well established that a conspiracy count need only charge the substantive offense which the defendants desired to commit, not all the elements of that offense. *Williamson* v. *United States*, 207 U.S. 425, 447; *Wong Tai* v. *United States*, 273 U.S. 77, 81. Moreover, here this conspiracy count, like the substantive counts, went further and specified various means used to effectuate the conspiracy such as the falsification of books and records, etc.[5]

2. Petitioners contend (Pet. 11–13) that the three-month delay in sentencing from the time their pleas of *nolo contendere* were accepted on March 17 and 20, 1959, until June 19, 1962, was unreasonable and denied them due process. The reason for the delay, however, was that the trial judge wished to await the trial of petitioners' co-defendants. Since it is fundamental that a court should not sentence a defendant without inquiry into the facts and circumstances (see *Peters* v. *United States*, 307 F. 2d 193 (C.A. D.C.)), it was entirely proper for the trial

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[4] While *United States* v. *Goldberg*, 206 F. Supp. 394, 397 (E.D. Pa.), holds to the contrary, a conflict between a district court and a court of appeals of course does not justify the granting of certiorari by this Court.

[5] Petitioners' contentions with regard to the indictment are answered in greater detail in the government's brief when this case was first before this Court. See our brief in No. 238, Oct. Term, 1960, pp. 25–34.

court to delay sentence. Moreover, petitioners at no time protested the delay or demanded an earlier sentence (R. 462, 464, 482, 483). The failure to demand earlier sentence shows that petitioners were not seriously prejudiced by delay and precludes petitioners from a retroactive assault on the sentence. See *Pollard* v. *United States*, 352 U.S. 354, 362, note 8.

3. Petitioners allege (Pet. 7–10) the trial judge improperly considered evidence presented in the trial of the other two defendants in convicting and sentencing them pursuant to their pleas of *nolo contendere*. This question was not only never presented to the trial court, but petitioners' counsel themselves freely adverted to the trial in their pleas for leniency. The remarks of the district judge, referring to the trial testimony, were generally in response to counsel's statements. There is nothing in the record even suggesting that the trial court convicted petitioners on anything other than their pleas of *nolo contendere*. On the contrary, the written judgments explicitly state that "[i]t Is Adjudged that the defendant has been convicted upon his plea of *nolo contendere*" (R. 553, 555, 558). See also the government's brief when this case was previously before the Court, No. 238, Oct. Term, 1960, pp. 34–37.

As to the use of the evidence for purposes of sentencing, we submit that the trial court has the freedom and discretion to inform itself by considering any reliable information in order to impose a proper sentence. In *Williams* v. *New York*, 337 U.S. 241, this Court upheld a death sentence although the trial

court was influenced to ignore the jury's recommendation of life imprisonment by undisclosed hearsay information in a pre-sentence report of the probation office. Similarly, the Probation Officer's Manual issued by the Administrative Office of the United States Courts recommends that the files of the United States Attorney and other law enforcement agencies be used for pre-sentence investigation. Sworn testimony and documentary evidence available to all the defendants and scrutinized in the course of a trial is far more reliable as a basis for sentence."

4. Petitioners' final argument (Pet. 16–17) is that, since the written judgments stated that they were guilty of offenses which are misdemeanors, imposition of the sentences for felonies was beyond the jurisdiction of the district court. More specifically, they rely on the language of the written judgments describing the offenses as "the offense of filing false and fraudulent corporate income tax returns" and "conspiring to file false and fraudulent corporate income tax returns" (R. 553, 555, 556, 558). They claim that this language describes offenses under Section 145(a) of

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[n] Petitioners, quoting a phrase from the government's brief when this case was first before the court, state that "the Solicitor General admitted that 'If they [Petitioners] were sentenced on evidence adduced at the trial of their co-defendants, they may have been deprived of their rights under the Sixth Amendment * * *'" (Pet. 7). The rest of this sentence and its context, however, show that the government was assuming, *arguendo*, that petitioners' contention was correct on the merits. We were contending that even so, the issue did not involve the jurisdiction of the district court and therefore was not properly before this Court. See our brief in No. 238, Oct. Term, 1960, pp. 34–35.

the 1939 Code and Sections 7203 and 7207 of the 1954 Code, which are misdemeanors.

Ambiguities in a judgment are to be resolved in the light of the entire record. *Moore* v. *Harjo*, 144 F. 2d 318 (C.A. 10). The record here shows that the indictment charged the offense in the language of the felony statutes, Sections 145(b) and 7201 of the Internal Revenue Codes of 1939 and 1954, which were cited by title and section. Petitioners pleaded count by count to that indictment as it was read to them. The court orally announced that it found petitioners "guilty of the felonies as contained in the Grand Jury indictment" (R. 551–553). The sentences were appropriate only to felony convictions and the written judgments cited the felony statutes in describing the offenses. Petitioners' notices of appeal cited the same felony statutes as the basis of their conviction. Thus, it is obvious that the general descriptions of the offenses in the written judgments, if they do describe misdemeanors and not felonies, constituted merely a clerical error. If petitioners want the written judgments corrected, they can file in the trial court a motion under Rule 36 of the Federal Rules of Criminal Procedure, which allows clerical errors in judgments to be corrected by the sentencing court at any time. See also the government's brief when this case was previously before the Court, No. 238, Oct. Term, 1960, pp. 37–41.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

LOUIS F. OBERDORFER,
Assistant Attorney General.

JOSEPH M. HOWARD,
JOHN P. BURKE,
Attorneys.

NOVEMBER 1962.

APPENDIX

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

(a) Failure to file returns, submit information, or pay tax.—Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) Failure to collect and pay over tax, or attempt to defeat or evade tax.—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * * *

(26 U.S.C. (1952 ed.) 145).

Internal Revenue Code of 1954:

SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

* * * * *

SEC. 7203. WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

(26 U.S.C. 7201, 7203)

18 U.S.C.:

SEC. 371. *Conspiracy to commit offense or to defraud United States.*—If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more

than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Federal Rules of Criminal Procedure:

RULE 36. *Clerical Mistakes.*—Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

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Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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REPLY TO RESPONDENT'S ARGUMENT

Respondent has utterly failed to show any reason why certiorari should not be granted.

Conceding by its silence that the petition raises *very important* questions of criminal procedure, and being unable to point to any reason why these fundamental issues should not be resolved by this Court, the Government argues only (1) that the issues were not "properly raised" (Br. 7-9), and (2) that the position of Petitioners on the issues is "without merit" (Br. 9-15). Neither argument is particularly relevant to the instant question, *i.e.*, whether or not certiorari should be granted, and both are entirely fallacious.

It is most surprising to find the Government arguing — *at this late date* and *without authority* — that the questions

presented were not "properly raised" in the courts below. Each of the questions presented was precisely briefed, argued and *decided* in the Court of Appeals (Pet. 7a-28a), and there the Government made no argument that the issues were not properly before the court. Indeed, this Court had remanded the case to the Court of Appeals for the purpose of enabling it to decide such issues. With only slight variations in presentation, these issues were briefed and argued by both sides before this Court on the earlier grant of certiorari, but the Court elected not to determine them because they had not yet been decided by the Court of Appeals.

Everything reasonably possible was done to raise in the trial court the questions presented. The indictment was strenuously attacked before and after judgment (R. 61-80; 559-568; 578-580). Of course, while Petitioners were awaiting sentence after their pleas of *nolo contendere*, hoping for and expecting mercy from the trial court, they could not object to the action of the trial court in trying them *in absentia*, in effect, during the Farnsworth trial.[1] In the first submission to the Court of Appeals and in this Court, Petitioners argued all along the substance of the questions here presented: (1) that the indictment was insufficient, (2) that the trial court committed error in basing the convictions and sentences upon evidence adduced at the Farnsworth trial, and (3) that the judgments convicted Petitioners of misdemeanors. Further briefing and argument has naturally resulted in further delineation of and elaboration upon these basic contentions of error — but *no new matter* has been raised. Most of Petitioners' contentions go to the jurisdiction of the trial court and the failure of the indict-

[1] Although the record does not reflect it, it is a fact that counsel for Petitioner Lott, when considering a change of plea from "not guilty" to *nolo contendere*, requested the trial court to sentence him prior to the Farnsworth trial, in the event that a *nolo contendere* plea was accepted. It is also true that the trial court refused to grant this request.

ment to charge an offense, which "shall be noticed by the court at any time during the pendency of the proceeding." Fed. R. Crim. P. 12(b)(2). Furthermore, in any event, "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Fed. R. Crim. P. 52(b). The errors raised by Petitioners are indeed *plain* and affect their freedom — the *most precious right*.

The Government's sketchy "broad-brush" argument on the merits serves only to emphasize the importance of the questions and the compelling reasons why certiorari should be granted. It would not be appropriate for Petitioners to present a detailed argument on the merits in this reply brief,[2] but it does not seem amiss to point out a few of the inaccuracies, incongruities and omissions in the Brief in Opposition. The Government does not attempt to square the decision below with *Russell* v. *United States*, 369 U.S. 749 (1962), discussed in the Petition, p. 14. It does not answer the eminently reasonable proposition that an indictment of employees for attempted evasion of taxes of a large corporation is quite different from a charge that an individual attempted to evade his own taxes, and that such an indictment should do more than merely follow the language of the statute — *at a minimum it should show what wrongful acts are attributed to each of the accused employees.* The Government states that "There was also no need for the indictment to allege that the taxes actually paid by the corporation were deficient" (Br. 11), ignoring the long line of cases which have held that existence of a tax deficiency is an *essential element* of the offense.[3]

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[2] Petitioners' contentions were set out in detail when this case was first before this Court. Brief for Petitioners, No. 238, October Term, 1960, pp. 25-55.

[3] Pet., p. 14; Brief for Petitioners, No. 238, October Term, 1960, p. 29.

The obviously unreasonable and prejudicial delay in sentencing, in violation of Rule 32(a), is said to be all right because "the trial judge wished to await the trial of petitioners' co-defendants" (Br. 12). Then the Government argues in effect that if Petitioners were tried *in absentia* such procedure was within the discretion of the trial court. No answer is made to Petitioners' contention that the trial *in absentia* of the issue of guilt or innocence, which was precluded by the acceptance of *nolo contendere* pleas, constituted an implied rejection of those pleas. And *finally*, the Government presents no reason why this Court should not decide the important issue concerning the effect of *variances* between the oral pronouncement and the written judgment.

In short, the Brief in Opposition wholly fails to show any ground for denial of the petition for a writ of certiorari.

CONCLUSION

For the reasons stated therein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November, 1962.

PROOF OF SERVICE

I, William M. Ryan, one of the attorneys for the Petitioners herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 27th day of November, 1962, I served copies of the foregoing Petitioners' Reply to Brief in Opposition on the United States by mailing five copies in a duly addressed envelope, with air mail postage prepaid, to Archibald Cox, Esq., Solicitor General of the United States, United States Department of Justice, Washington 25, D. C.; by mailing five copies in a duly addressed envelope, with air mail postage prepaid, to Louis F. Oberdorfer, Esq., Assistant Attorney General — Tax Division, United States Department of Justice, Washington 25, D. C.; and by mailing five copies in a duly addressed envelope, with first class postage prepaid, to Woodrow B. Seals, Esq., United States Attorney for the Southern District of Texas, New Federal Building, 515 Rusk Avenue, Houston 2, Texas.

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